No. 683

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

GEORGE W. HARTMANN,

Petitioner,

v.

THE AMERICAN NEWS COMPANY, a Delaware Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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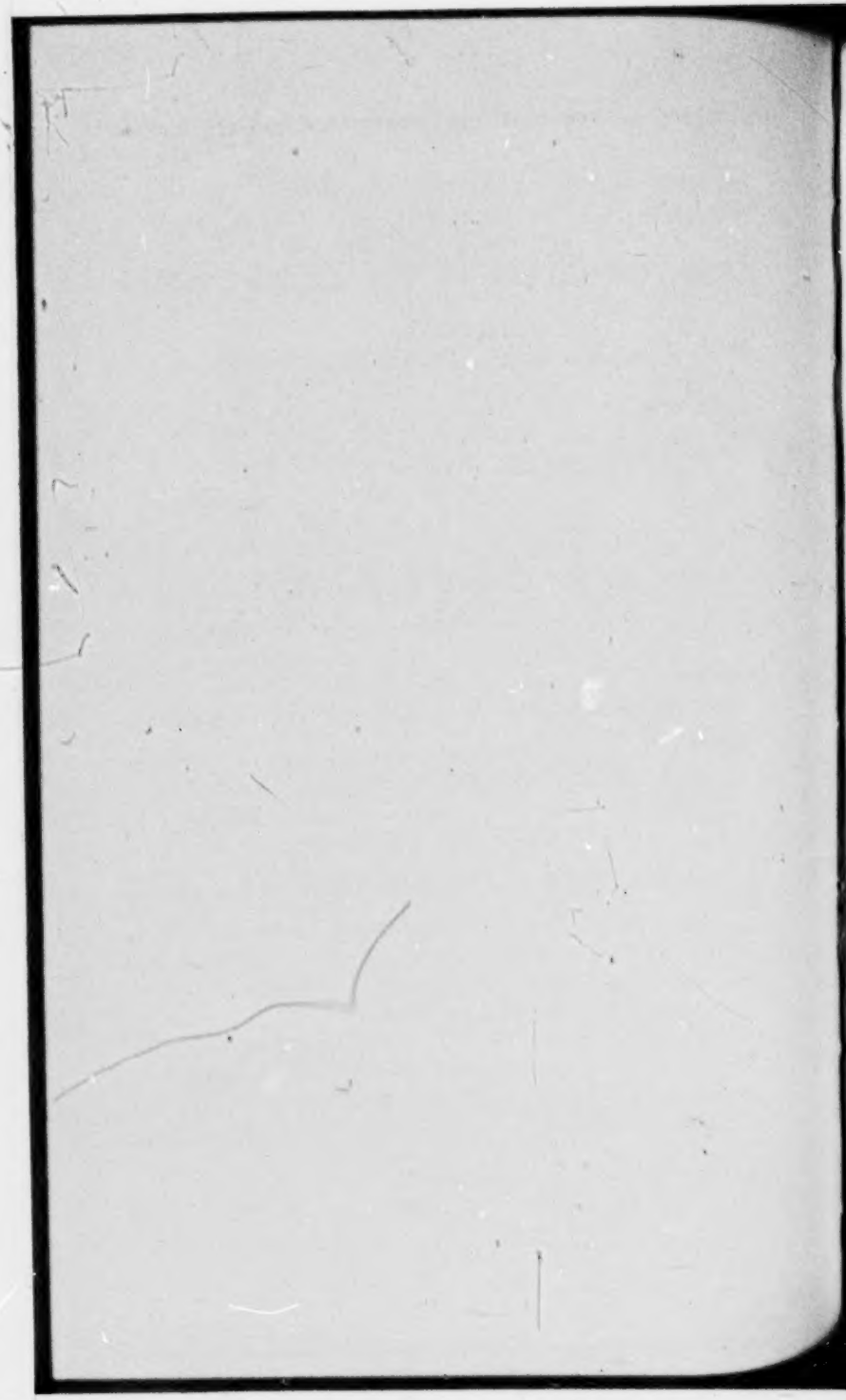

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, George W. Hartmann, a resident of the State of New York, prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court entered December 3, 1948, and its order entered January 4, 1949, all of which affirmed a judgment of the United States District Court for the Western District of Wisconsin rendered after trial before the court and a jury. Your petitioner seasonably filed with the Circuit Court of Appeals his petition for rehearing. The petition was denied by order entered January 4, 1949. A certified transcript of the record is furnished herewith in accordance with the Rule 38, Par. 1, of the Rules of this Court. This petition was filed within the time limited therefor.

Summary and Statement of Facts

This action was brought to recover damages caused by the printing of a libel by LIFE magazine and distributed by the respondent. The jury rendered a verdict for the defendant upon which the court entered the judgment from which an appeal was taken. The errors relied on arose out of errors of law, rulings on evidence and instructions to the jury given and refused.

The petitioner is by profession an educator and writer, and is a nationally recognized authority in the field of educational and social psychology; is the author of numerous books, his best known being "Gestalt Psychology". His post is that of Professor of Educational Psychology at Teachers College, Columbia University, having taught at many other colleges and universities. He is listed in Who's Who.

For many years he had been active in various Peace Societies such as the Fellowship of Reconciliation (F O R), the National Council for the Prevention of War, the Peace Section of the American Friends Service Committee, etc., etc.

He was active among the Quakers when he taught at Pennsylvania State College. He, at that time, became interested in the work of Dr. Jesse Holmes of Swarthmore College, who was then urging younger scientists to consider the moral and social implications of scientific activity. Petitioner wrote articles on Peace for the Center (Pa.) Daily Times and other periodicals.

In July, 1943, the "Peace Now" Movement was launched by Quakers and several other persons prominent in the Peace Movement. Petitioner was present and was chosen its temporary chairman. Several Quakers were selected to head other posts in the organization.

A public meeting was held by the group on December 30, 1943, in the City of New York at Carnegie Hall. Dr. Hartmann was the principal speaker. He prepared a speech which was printed and distributed to the press in advance of the meeting. One purpose was to prevent misquotation.

LIFE magazine used the meeting as a publicity base and proceeded to put a fascist smear on Prof. Hartmann and "Peace Now". In LIFE, January 17, 1944, there appeared a story of the Washington Indictments of 30 Fascists. And "U. S. Indicts Fascists (continued)" appeared directly over Dr. Hartmann's hair-line on page 18.

In about a third of the copies circulated, the caption was deleted, however, about 1,550,000 copies bore the caption. There was evidence of a teletype message between the New York and Chicago offices of LIFE that the caption must be deleted and this was "a legal matter and must be done regardless of cost".

In its issue of February 7, 1944, answering a letter of protest by Dr. Hartmann, LIFE admitted the charge was false. The general manager of LIFE also admitted the falsity of the charge. But no retraction was ever made.

The American News Company admitted distributing the lion's share of the copies of LIFE containing the libel. It defended on the ground that it knew nothing; that there was a custom among distributors not to examine what they distribute; that time is of the essence in distributing magazines and hence it relies on the integrity of the publisher; that it made no efforts to learn of the contents of the magazine; that it received no notice from LIFE not to distribute; that what it distributed was in fact truthful and that it was conditionally privileged as fair criticism.

The trial court, on motion, held that "plaintiff was accused of having been indicted by the United States Government". During the course of the trial however, the

court reversed this position and submitted to the jury the question whether this caption was libelous. The court below affirmed this position, going outside of the briefs submitted by the defendant to raise the question whether this was "merely a printer's device to tie up related events" (Opinion, R., p. 454).

The trial court had also held that whether the American News Company was negligent in not knowing the contents of the magazine was a question for the jury. The lower court affirmed this, holding that the evidence of custom made this a jury question (Opinion, R., p. 455).

The trial court admitted, over objection, a Report of the House of Representatives Special Committee on Un-American Activities (then known as the Dies Committee). Its contents were read to the jury; it consists of pure hearsay.

The record shows (and the opinion states, that it was based "almost entirely upon the files of the organization". NOT ONE WITNESS WAS EXAMINED and the name of none appears in the report. It is replete with violent conclusions and opinions of the guilt of all connected with the Peace Now Movement of sedition, treason and similar high crimes (R., p. 455).

The opinion below justifies the admission in evidence of this report on the ground that the PURPOSE was proper although *its contents were not* (R., p. 455).

The trial court also admitted other newspaper and magazine articles carrying similar libels, all received over objection. All receive the sanction of the court below on the ground that they MIGHT have caused the injury complained of. This reasoning is attached to the DIES REPORT as well.

The trial court admitted over objection, an address by the late president, F. D. Roosevelt, to the Congress of the United States. Although this matter was argued in the

court below, the opinion is silent thereon. It was offered by respondent as a statement of "one who knows" as against petitioner's testimony on a controversial point (R., p. 208).

Still other newspaper and magazine articles were admitted by the trial court over objection. The opinion below disposes of the argument as to their invalidity by the curt statement that they affected the issue of mitigation of *compensatory* damages. (Italics supplied.) (R., p. 457.)

Jurisdiction to Review

Jurisdiction of this Court is invoked under the Judicial Code, 240-(a), as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347-(a)). The date of the judgment of the Circuit Court of Appeals for the Seventh Circuit to be reviewed was entered December 3, 1948 and the order denying rehearing by said Circuit Court of Appeals was entered January 4, 1949 (R., p. 458).

The Questions Presented

1. Is the decision of the Circuit Court of Appeals in conflict with the law pertaining to libel laid down by this Court in holding that petitioner was not libeled as a matter of law?

2. Is the decision of the Circuit Court of Appeals in conflict with local Wisconsin law in holding that petitioner was not libeled as a matter of law?

3. Is the decision of the Circuit Court of Appeals in conflict with the law and spirit of the State of Wisconsin

   (a) in that it fails to recognize the distinction between big and little business which Wisconsin makes?

(b) in that it permitted evidence of a private custom to override the law for the purpose of overcoming the wilful negligence of respondent?

4. Is the decision of the Circuit Court of Appeals in conflict with local Wisconsin law and the general rules pertaining to the admissibility of evidence in admitting in evidence the Dies Committee Report which is pure hearsay?

5. Is the decision of the Circuit Court of Appeals in error in holding that the receipt in evidence of the war-time speech of the late president, Roosevelt, was not materially prejudicial to petitioner?

6. Is the decision of the Circuit Court of Appeals in conflict with local Wisconsin law and the general rules of evidence in upholding the receipt in evidence of other newspaper accounts, magazine articles and other material for the purpose of reducing compensatory damages?

7. Is the impact of this decision of the Circuit Court of Appeals so grievous upon the daily life of the citizenry that the public welfare requires a review of the principles and rules adopted therein?

Reasons for Granting the Writ

1. The Circuit Court of Appeals has decided an important question of Wisconsin law in a way probably in conflict with applicable local decisions, as well as a decision of this very Court.

The question is important for it provides an escape route for libelers who most certainly will hide behind the excuse that the libel was the result of a printer's device or error.

The decision below probably is in conflict with the applicable decision of this Court in the case of *Peck*, petitioner, v. *Tribune Co.*, (1909) 214 U. S. 185, 29 S. Ct. 554, 53 L. Ed. 960, 16 Ann. Cas. 1075 reversing 1907, 154 F. 330, 83 CCA 202. The same Circuit Court was there involved and the same line of reasoning was adopted by that Court. And so, after a lapse of almost forty (40) years that Circuit Court of Appeals seeks to overrule this Court. This Court, by Justice Oliver Wendell Holmes, said: (p. 188):

> "The libel alleged is found in the defendant's newspaper, . . . 'One of Chicago's Most Capable . . . Nurses, Pays An Eloquent Tribute to . . . Duffy's . . . Whiskey.' Then followed a portrait of the plaintiff, with the words, 'Mrs. A. Schuman,' under it. Then followed words showing use by her of the product . . . and words . . . conveying notion of a signature * * *. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer . . .. At the trial, . . . the judge excluded plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the circuit court of appeals, 83 C. C. A. 202, 154 Fed. 330. . . . Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. *There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous, the defendant took the risk.* As was said of such matters by Lord Mansfield, 'Whenever a man publishes, he publishes at his peril.' "

That renowned jurist, in the case cited by Mr. Justice Holmes in the foregoing opinion, *The King* v. *Woodfall*, 98 English, 916, 917 says:

> "And to suffer it to be an excuse (lack of knowledge) would be opening a door for all libels with impunity."

Wisconsin too has rejected such plea in *Smith* v. *Utley, et al.*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620.

Although the opinion states "that to call a person an indicted fascist is libelous *per se*" (p. 6) and "the caption above his picture in the first article read: 'U. S. Indicts Fascists (continued)'" and "the table of contents in the first issue listed the article as "Fascist Indictments and 'Peace Now'" it holds that a jury question is raised as to whether it is libelous or non-libelous. This is in direct conflict with the decision of this Court in the *Peck* v. *Tribune* case, *supra; Holden* v. *American News Co.*, 52 F. Supp. 24; *Wandt* v. *Hearst's Chicago Am.*, 129 Wis. 419; *Morrison* v. *Smith*, 177 N. Y. 366. Not only is the decision in conflict with the authorities on this point but is in direct conflict with the expressions of opinion of the Court uttered at the argument below. During a spirited exchange between the Presiding Judge and counsel for respondent, the latter insisting that "no person of average intelligence would construe Exhibit A-5" (R. p. 252) "as meaning that plaintiff is an indicted Fascist" the Court answering that if it were his picture he would hold he was an indicted Fascist. This is the normal reaction—the decision is not.

2. The Circuit Court of Appeals has decided another matter probably in conflict with the applicable law of the State of Wisconsin relating to compensatory damages, in upholding the trial court's refusal to allow such damages to petitioner.

Under the rule of law laid down in *Williams* v. *Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183, the trial court

was under duty to instruct the jury to award compensatory damages to petitioner, the amount being in their discretion. Since respondent did not prove the truth of the charge, in fact it was admitted that it was not true, compensatory damages followed as a matter of law.

3. In another particular is the decision probably in conflict with the law and spirit of the State of Wisconsin for it fails to make the logical and semantic distinction between big and little business in distributing magazines.

(a) As to this the decision holds that the distributor of an alleged libel is not liable if he can prove that he did not know and was not negligent in not knowing, citing *Street* v. *Johnson,* 80 Wis. 455, 458. That case involved a local, small town, corner news dealer, way back in 1891 in the horse and buggy era, who presumably had no means of checking the facts. But this is not true of a many million dollar concern, with offices all over the land, with vast potentialities for harm and ability to prevent it (R., p. 455).

Since then Wisconsin has differentiated between large and small business in its Workmen's Compensation; in its Unemployment Compensation; in its treatment of cities, classifying them according to *size;* in its consideration of the income tax payer. It is common knowledge too, that foreign corporations do not operate with immunity in Wisconsin. Hence to apply a rule of law, adopted in 1891 for the benefit of a corner newsdealer by Wisconsin courts, in favor of a national million dollar concern so stretches the doctrine of *Street* v. *Johnson,* as to make it conflict with current Wisconsin doctrines and viewpoint and with the letter and spirit of her laws.

Moreover, to assume that Wisconsin courts would apply that doctrine to a case where a large distributor deliberately and wilfully chooses to ignore all channels of information open to it and voluntarily proceeds to distribute defamatory material in a public-be-damned manner is com-

pletely unfounded and further stretches the doctrine of that case as to make it conflict completely and decisively with it.

Again, the *Street* case requires proof that the distributor be NOT negligent; that the distributor bear the burden of proof that he was *not* negligent. Thus the standard is not reasonable care but extraordinary care. Hence a million-copy distributor does not have an avenue of escape by a showing of wilful and deliberate ignorance.

(b) In another particular is the decision of the Circuit Court of Appeals probably in conflict with local Wisconsin law. It approves evidence of a private custom among distributors to rely on the integrity of the publisher. This argument is not new; it has been advanced again and again—always being rejected until this case (R., p. 455).

That custom should supplant the law was argued in *Harrington* v. *Edwards,* 17 Wis. 604. It was decisively rejected as follows:

> "Neither would it have been proper for the judge to have received evidence of the custom of raftsmen to anchor their rafts regardless of the wishes or convenience of the proprietors of adjoining lands. Raftsmen could not establish a custom among themselves which would override the common law rights of the riparian owners." (p. 606)

That custom and usage cannot justify negligence, nor relieve one from liability is widely accepted:

Am. Coal of Alleghany County v. *De Wese,* 30 F. 2d 349;
Standard Oil Co. of N. Y. v. *R. L. Pitcher Co.,* 289 F. 678;
Northam v. *Boston & Montana Cons. Copper & Silver Mining Co.,* 190 F. 722, 111 CCA 450;

Fletcher v. *B. & P. R. Co.*, 18 S. Ct. 35, 168 U. S. 135, 42 L. Ed. 411;
Grand Truck R. Co. v. *Richardson*, 91 U. S. 454, 23 L. Ed. 356.

The rule is sound common sense, for, if business is allowed to make private customs, one by one the rights of the public would be completely abrogated.

4. In another particular is the decision of the Circuit Court of Appeals probably in conflict with the law of Wisconsin. It holds (R., p. 457) that the Dies Report was properly admitted to reduce compensatory damages. This is in direct conflict with the Wisconsin rule laid down in *Pfister* v. *Milwaukee Free Press Co.*, 139 Wis. 627, 121 N. W. 938, as follows:

> "The courts generally hold that evidence of this character is improper in *reduction* or in mitigation of damages." (pp. 641-2, italics added.)

The *Pfister* case states the rule to be directly opposite to that written into the decision below.

In the Restatement of the Law, Torts, Sec. 621 (a) we find:

> "Meaning of general damages. General damages are a form of compensatory damages. They are imposed for the purpose of compensating the plaintiff for the harm which the defamatory publication is proved, or, in the absence of proof, is assumed to have caused to his reputation. It is not necessary for the plaintiff to prove any specific harm to his reputation or any other loss caused thereby. Indeed, in many cases the effect of the defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed. If the plaintiff is able

to show a particular pecuniary loss resulting from the defamatory publication, he may recover for the special harm thus caused under the rule stated in Sec. 622. If however he is unable to show such definite loss, but the defamatory publication is of such kind and was published under such circumstances as to justify the inference of some general impairment of his reputation, or, through loss of reputation, to his other interests, he is entitled to recover damages therefor."

So it is perfectly clear that compensatory damages, or general damages, which includes and embraces, emotional distress and bodily harm (see, Restatement, Sec. 623) cannot be reduced and the proof, offered in reduction thereof was erroneously received AND SIMPLY CREATED CONFUSION IN THE MINDS OF THE JURY. This was the real and governing purpose behind this move which is easily discerned through reading the record as a whole. For, if a mob beat an individual, the fact that the latter did not fall under the blows until the tenth one had been struck does not lessen the harm done by the first. Yet that is the very argument justifying the "evidence" offered and received.

Wisconsin follows the common law rules and those are succinctly stated to be:

"*A fortiori,* evidence that there was a widespread report or rumor to the same effect as the words complained of is inadmissible; for it clearly falls short of a justification, and is moreover objectionable as hearsay." (Citing cases) Odgers, Libel and Slander, 5th Edition, 1911, pp. 393, 394.

"(ii) Previous publication by others.

Evidence of previous publication by others is, as a rule inadmissible even in mitigation of damages; that others besides the defendant have defamed the plain-

tiff is an irrelevant fact. (Citing cases) . . . And even when the falsehood thus unchallenged grows to be a persistent rumor or general report, which the defendant hears, believes, and repeats; this is not regarded in law as a mitigating circumstance" (p. 394).

"(iii) Liability of others.

At common law, if the present defendant is liable, the fact that someone else is also liable is immaterial. *It will not diminish the amount recoverable from the present defendant, to show that the plaintiff . . . might recover, other damages from others; . . .*" (p. 397.) (Italics supplied.)

"If the present defendant is liable, the fact that someone else is also liable is, of course, no defense. The plaintiff may *at his option* sue one or all in the same or in different actions." (p. 695.) (Italics supplied.)

5. The decision is in conflict with Wisconsin law and the general rules of evidence of universal application in glossing over plaintiff's objections to the admission in evidence of the speech of the late president, F. D. Roosevelt (Ex. 144, R., pp. 349-367), (R., p. 457).

No satisfactory reason was ever given for its introduction in evidence and since it was highly colored in language and appeal its only end and purpose was to inflame and prejudice the jury. Its admission paves the way for use of political speeches as evidence.

Its reception in evidence is in conflict with old established rules against hearsay evidence deeply rooted in the Common Law. It is in direct conflict with the decisions in

Gaines v. *Relf*, 12 Howard 472, 569;
Commonwealth v. *Slaviski*, 245 Mass. 405, 140 N. E. 465;

Sturla v. *Freccia*, L. R. 5 App. Cas. 623;
Gilmore v. *U. S.*, 93 F. 2d 774;
Nunnally v. *Press Pub. Co.*, 110 App. Div. (N. Y.) 10.

It runs counter to the considered opinions of the text writers.

Richardson on Evidence, 6th Ed. (1944), 546;
Wigmore, Evidence, Vol. 5, 3rd Ed. (1940), Sec. 1661.

These decisions and authorities apply with equal force to the earlier discussion concerning the inadmissibility of the Dies Report.

The admission in evidence of that report, the speech of FDR and other material, made it impossible for petitioner to have a fair trial. *It is unbelievable that the speech was offered and admitted for the purpose of impeaching petitioner's testimony.* (R. p. 208) On the argument below, a member of the Court wanted to know on what conceivable theory was this speech admissible. And after the answer was given remarked that it was an answer BUT NOT A SATISFACTORY ONE. For it is manifest that the REAL purpose was to prejudice the jury by seemingly aligning FDR and the administration on the side of the defense. Such tactics must be stopped short by this Court for the future well-being of all litigants.

6. (a) The decision is further in conflict with Wisconsin law and the general rules of evidence of universal application in allowing the admission of other magazine articles, newspapers and other accounts, and similar libels in mitigation of *compensatory* damages (R., p. 457). This is in direct conflict with

Pfister v. *Milwaukee Free Press Co.*, 139 Wis. 627, 121, N. W. 938;

Smith v. *Sun Printing & Pub. Ass'n*, 55 Fed. Rep. 240, 245;
Palmer v. *Matthews*, 162 N. Y. 100, 102.

It is condemned by the text writers.

Odgers, Slander and Libel, 5th Ed., 1911, pp. 393, 394, 397 and 695;
Newell, Slander and Libel, 3rd Ed., Sec. 1054, p. 1078.

Newell says, p. 1078:

> "At common law if the defendant is liable, the fact that someone else is also liable is immaterial. It will not diminish the amount recoverable from him to show that the plaintiff has recovered or might recover damages from others."

And at page 1075, in one of the footnotes (3):

> ". . . evidence that many other papers besides the defendant had copied the statement . . . was inadmissible." (Citing several English cases.)

The quotations from *Odgers*, which appear at pages 12-13 are in almost identical language with the foregoing. This is the law of Wisconsin, for the *Wilson* v. *Noonan*, 35 Wis. 321, 353 we find:

> "For the impression thus produced, and the injurious consequences which followed, that is, for all actual damages sustained by plaintiff, the defendant must respond in this action . . .."

And so we must reach the conclusion that this inadmissible "evidence" helped make impossible a fair trial.

(b) Another such exhibit and "evidence" was No. 130 (R. p. 329) concerning one John Dutko, who was convicted

ONE MONTH AFTER PUBLICATION OF THE LIBEL of leaving a C. P. S. camp to which he had been assigned as a conscientious objector. He left camp because he was refused work of national importance. The court admitted his judgment of conviction and allowed defendant to comment thereon although it appeared he was NEVER AN OFFICER OF PEACE NOW. Its use was to establish, in addition to the Dies Report, that petitioner was a law-breaker by associating him with a law-breaker.

7. The results of the decision of the Circuit Court of Appeals are so grievous upon the life of the citizens of this country that the public welfare requires a review thereof.

a. Fascist terror and communist smear techniques have received the green light from the Circuit Court of Appeals. It is by now common knowledge that LIFE was staffed with reformed and unreformed Communists in 1943 and 1944, the time of the publication of the libels here involved. The smearing of political opponents by Communists is best described in "The Smear Terror" by John T. Flynn. What took place in the campaign against Dr. Hartmann follows the pattern there described. His opposition to the Communists in the fight in the Teacher's Union (R. p. 40) for control suffices to explain the use of a Communist inspired smear against him perpetrated through LIFE magazine and the other publications they infiltrated in that period. The "prize" witness of respondent was one Irving Haberman, employed at that time by PM, which followed the Communist line and was roundly denounced on the floor of the United States Senate.

The second disturbing result of the decision is that it rewards ignorance and deliberate disregard of the rights of Mr. Citizen. Spicy stories and sensationalism pay divi-

dends and now the Circuit Court of Appeals sanctions the complete *abandon* with which it is purveyed.

Of paramount importance to the citizen who wishes to express himself on matters of public concern is that he can now be accused by such un-American methods of inquiry as were the stock in trade of the Dies Committee, which was roundly condemned so often and completely that it became the laughing stock of the country and its chairman retired to private life. Not only can he be accused but the accusation accepted in courts of law. That a report of such committee can be admitted as evidence for *any* purpose is an overwhelming defeat for civil liberties. The decision will be construed as approving those techniques of inquiry familiar to the fascist and communist state police, but new to the American system of the right to a fair trial, the right to be heard, the right to confront a witness and the right to cross examination.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, sitting at Chicago, Illinois, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals in this case, to the end that this case may be reviewed and determined by this Court; that the orders and judgment of the Circuit Court of Appeals be reversed and a new trial ordered; and that petitioner be granted such other and further relief as may seem proper.

GEORGE W. HARTMANN,
By ALFRED A. ALBERT,
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March 30, 1949.

BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The opinion of the District Court denying defendant's motion for summary judgment has been reported in 69 F. Supp. 736. The opinion of the Circuit Court of Appeals is reported in 171 F. (2d) 581. Rehearing was denied on January 4, 1949.

Facts

Petitioner, Professor Hartmann was educated at Columbia College and Columbia University from which he received his Ph.D. in 1928. He went to Germany in 1930-1931 (before Hitler's time) on a post-doctoral research grant from the Social Science Research Council to complete his work of preparing "Gestalt Psychology." (R. p. 38)

While abroad, Prof. Hartmann visited England, Holland, Belgium, France, Italy, Spain, Austria, Czecho-Slovakia, Poland, Denmark, Sweden, Finland and Russia.

Prof. Hartmann upon his return in the Fall of 1931 resumed his teaching at Pennsylvania State College where he was made associate professor of Educational Psychology. He remained there until 1935 when he accepted a position at Teachers College, Columbia University, becoming a member of the permanent staff there in 1936. In 1940 he was elevated to the rank of full professor, which carried with it the right to permanent tenure and sabbatical leave of absence. (R. p. 39)

Prof. Hartmann belonged to many professional organizations and students from Wisconsin and from all over the United States have been members of his classes. (R. p. 61)

Having earned a leave from Teachers College, beginning July 1, 1942, Professor Hartmann accepted an appointment as Visiting Lecturer in the Department of Psychology at Harvard University and Research Director under the auspices of the Ella Lyman Cabot Foundation there which was studying the causes and cure of juvenile delinquency. He returned to Teachers College for the summer session of 1943 but obtained an extension of his leave to remain at Harvard for the academic year beginning September, 1943. (R. p. 42)

Professor Hartmann for many years prior to December, 1943 had been active in the several peace movements, such as the Fellowship of Reconciliation (F. O. R.), the National Council for the Prevention of War; the Peace section of the American Friends Service Committee; Emergency Peace Campaign (1935-7) which raised more than two million dollars for the purpose of awakening public sentiment in America to the dangers of the coming world conflict caused by our economic policies; the Jane Addams Peace School of which he was founder and director and the Keep America Out of War Congress (1938-41) developed to counteract the still dangerous drift of our national policies in the way of re-armament, defense economics and general conduct of foreign policy by which Roosevelt was bringing the United States nearer to the brink of war. (R. pp. 40-43)

He was nd has continued to be an active Socialist. In 1938 he campaigned with Norman Thomas in New York and in 1941 ran for Mayor of New York as the only "peace" candidate being opposed to LaGuardia who was backing Roosevelt's efforts actually to get into the war. (Ex. U)

He resigned from the College Teachers Union because it was, as he believed, Communist controlled and he published his experiences in an article entitled "The Behavior of Communists in Unions." (Vol. L of Ethics, No. 3, April, 1940, R. p. 40)

In July, 1943, the "Peace Now" Movement was launched at the Hotel Whittier, in Philadelphia by Quakers and other persons prominent in the peace movement. The call for the organizing meeting was sent by Frederick Libby, executive secretary of the long standing National Council for the Prevention of War. Prof. Hartmann, became temporary and later permanent chairman of the organization. Dr. Dorothy Hutchinson, a prominent Quaker and author of pacifist pamphlets for the Quakers, became Vice-chairman; Frederick Libby, Treasurer; Bessie Simon, Secretary; and John A. Collett, Field Secretary. (R. p. 43)

The "Peace Now" movement issued a statement of beliefs in which it set forth its arguments for Peace Now (1943) instead of a punitive, vengeful, delayed, unilateral peace, (Ex. F, R. p. 54, Ex. S, R. p. 270) It expressed the belief that negotiations for stopping the war were possible if the United Nations, especially the United States, would publish to the world a statement of fair, just and durable peace aims, which would amount to a renunciation of the barbarous "unconditional surrender" policy of the victors.

In August, 1943, temporary working space for Peace Now was loaned by two New York Quakers, Mr. and Mrs. John Eubank in their apartment. About October, 1943, a regular office was acquired in New York and maintained there until about April, 1944. Prof. Hartmann during this time was residing in Massachusetts. He was not in charge of the office directly but kept more or less in touch with its activities. Bessie Simon, Secretary, and Mrs. Eubank did most of the correspondence and office work. (R. p. 43) The Movement had a great deal of autonomy and was never a closely knit organization. Sometimes Prof. Hartmann saw its correspondence and material before it was sent out and sometimes not until afterwards. (R. pp. 67-68; 215)

Its early activities consisted largely in mailings and the distribution of Dr. Hutchinson's pamphlet entitled "A

Call to Peace Now" (Ex. 2), which had been circulated in the Spring by the Quaker groups in Philadelphia and had been sent to all the members of Congress and other officials. (R. pp. 43-44)

A public meeting was held by Peace Now on December 30, 1943, at Carnegie Hall in New York City to acquaint the people of the New York area with the existence of the organization. This meeting was sponsored by the Rev. Gideon Olson of the Norwegian Lutheran Church in Brooklyn, by the Rev. John Calvin Newman, Chaplain of the Great Lakes Junior College in Detroit, Dr. Dorothy Hutchinson, and Professor Hartmann, who was the principal speaker. (R. p. 44)

Prof. Hartmann's speech (Ex. 20) printed prior to delivery and distributed to the news reporters present, was entitled "America Faces the Great Destiny" . . . subtitle "Peace Without Victory or Victory Without Peace." The printing of the speech in advance was for convenience of the reporters and as a precaution against misquotation.

In his speech Prof. Hartmann placed before the people the choice of Peace based on Power and Revenge, i.e., Unconditional Surrender as a result of military subjugation, or a Negotiated Peace based on the mutual respect of mankind,—a hard but noble Peace which might mean Victory for all mankind.

He pointed out that war wastes millions of lives and billions of dollars and asked the question "Must the Killing Go On?" In opposition to a "fight to the finish" he placed a war ended by negotiation. In support of his plea for an Armistice he quoted from Pope Pius XII's radio message to the world of September 1, 1943.

With prescience which now seems prophetic, Prof. Hartmann in his speech forecast that Unconditional Surrender in the great game of power politics would give Russia control in the Balkans and Europe.

The "Win the Peace Now" group in Madison, Wisconsin, had previous to the New York organization held a public forum at which the proposed "unconditional surrender" program of Morgenthau and Roosevelt had been criticized and a program of "Peace Now" on a more humane, just and durable basis offered in its place (R. pp. 148-9 and pp. 187-188) (Ex. Q) Leaders in the Madison group were professors, ministers, socialists and other prominent members of the community. The old-established peace groups such as the National Council for the Prevention of War, the War Resisters League and Fellowship of Reconciliation were also waging a peace now campaign demanding just and reasonable peace terms instead of unconditional surrender.

Returning to Prof. Hartmann's speech, we find him saying that:

Economic cycles and war are causally related, that during the Great Depression of the Thirties the world was hungry even though food was so plentiful that we destroyed it on a grand scale rather than give it away to the needy, because it could not be sold at a profit.

To get the world out of a Depression, the Great War of the Forties was the only answer the politicians of the world knew, he said. The New Deal by its policies and not by accident began by destroying food, killing pigs, and ended by killing the children of Europe and Asia in War. Similar policies led to the same results in other countries. "Failure to create even an approximation to world-wide equality of economic opportunity," led to war and the continuation of "Have" and "Have Not" nations and the creation of artificial scarcities he predicted will make future wars inevitable. As a program for the "Way to the Good Life for ourselves and others" Prof. Hartmann proposed a World Peace Conference to Negotiate Peace on the basis of mutual give and take, concerned chiefly with the objectives of (a) lowering trade barriers (e) ending the colonial

system of modern imperialism (c) giving occupied countries, including those then occupied by Nazis, rights of self-determination (d) abolishing military conscription everywhere.

The meeting was chaired by the Rev. John Calvin Newman of the Great Lakes Junior College at Detroit. Dr. David Mason, editor of "The Catholic Worker," spoke briefly.

LIFE proceeded to put a fascist smear on Prof. Hartmann and Peace Now. "U. S. Indicts Fascists (continued)" appeared over Prof. Hartmann's picture just above his hair line, in LIFE of January 17, 1944. (Ex. A-5)

This charge was false and LIFE admitted it in its issue of February 7, 1944. (Ex. B) Andrew Heiskell, General Manager of LIFE, in his testimony also admitted the falsity of the charge (R. pp. 181-182) but LIFE to this day has never made a legal retraction.

LIFE also admitted legal implications. Its editorial office in New York sent a teletype message to Chicago on January 8th and again on January 11, 1944, (while the issue of the 17th was in process of printing) which read:

> "Disregard double printing message sent for page 18 Caption I: U. S. Indicts Fascists (continued) Confirm there is no caption:" . . .
>
> "On page 17 must delete continued on next page line on page 18 must delete continued slug U. S. Indicts Fascists (continued).
>
> "Sorry these correx was so late but thru some accident I never saw the proofs and hence didn't catch it until I saw the make-ready. This is a legal matter and must be done regardless of cost.
>
> Marion."

And the answer went back:

> "This Truax church has rallied like a hero and says we will rout whole Top of Pix page 18 down to mans hair immediately and then remake we will catch a lot of the run this way don't suppose U got Philly but we have arranged to have McKean call us."
>
> (R. pp. 171-2)

This line was deleted, but distribution of 1,550,000 undeleted copies was made from Chicago and Philadelphia. One of the undeleted copies rests in the bound file of LIFE magazine in the University of Wisconsin Library at Madison which is open to students and citizens of the State. (R. p. 168)

Other than the caption over Prof. Hartmann's picture, the deleted copies carried the entire story, headlines, pictures, reference, make-up and juxtaposition the same as in the undeleted copies. (Ex. EE, R. p. 289)

On page 18 of LIFE (Ex. A-5), the printed matter in both deleted and undeleted copies carried the headline "'PEACE NOW' IS NEW PROPAGANDA DRIVE TO PREVENT U. S. VICTORY" in large, bold black type. The text states that "As a spell binder Dr. Hartmann compares favorably with Joe McWilliams (see page 15-17)" and quotes a passage from Prof. Hartmann's speech out of its context, a so-called punch line: "It is no accident that the New Deal which began by killing pigs, ended by killing the children of Europe and Asia." On the same page and on the next page, 19, (Ex. A-6) appear grotesque and out of focus pictures of the other participants and the audience.

Turning back to page 15 of LIFE (Ex. A-2) the reader finds the heading in one-half inch bold black letters: "U. S. INDICTS ITS TWO TOP FASCISTS." Pictures on the page are of two fascists, Lawrence Dennis and Joe McWilliams. Under McWilliams' picture the text reads: "Joe

McWilliams wants to be American fuhrer. 'Once in power' he said, 'I will down all dissident opinion . . . run government like a factory . . . ship all Jews to Madagascar.' "

On page 16 (Ex. A-3), LIFE purports to review "Under Cover," a catalog of the Fascist underworld. The headline in bold, black letters reads: "NO. 1 BEST SELLER IS THE STORY OF A ONE-MAN CRUSADE AGAINST U. S. FASCISTS." Along with this heading, LIFE printed pictures of Dennis as a boy and at Nuremberg in 1936 with a Nazi, probably Baron von Gienanth, later a secretary of the German Embassy in the United States. On the same page LIFE printed pictures of Joe McWilliams stumping Yorkville with "paunchy" Fritz Kuhn, fuhrer of the Bund and Mrs. Alexis de Tarnowski.

LIFE entitled page 17 (Ex. A-4) "THIRTY WASHINGTON INDICTMENTS INCLUDE SOME NEW FACES AND SOME OLD FAMILIAR ONES" and printed 9 photos of indicted fascists: Garland Alderman giving Nazi salute; August Klapprott, N. J. director of the Bund; Ernest Elmhurst, burly Bundist from New York; Gerhard W. Kunze, successor of Fritz Kuhn, as bund leader, and sentenced to 15 years for sedition; Ellis Jones (behind bars) for sedition; E. J. Parker Sage, Detroit, under indictment for inciting 1942 Detroit race riot; William Dudley Pelley, founder of the silver-shirts, serving 15 years for sedition; Charles B. ("poison cup") Hudson; George E. Deatherage, West Virginia organizer of Knights of White Camelia, which attacked "Jewocracy" and had a swastika emblem.

At the bottom of page 17 (Ex. A-4), appears the line "continued on next page" and on the next page (Ex. A-5) over Hartmann's picture is "U. S. Indicts Fascists (continued)" and the text with heading: " 'Peace Now' is New Propaganda Drive to Prevent U. S. Victory."

In the table of contents on page 13 of LIFE (Ex. A-1) under the "Week's Events" appears the index line: "Fas-

cist Indictments and 'Peace Now' . . . p. 15." At page 15 (Ex. A-2) begins the story entitled "U. S. Indicts Its Two Top Fascists." In the first paragraph of the story LIFE combines in the "crackpot fringe" the fifteen Trotskyites sentenced in Minneapolis for "Conspiracy to arouse insubordination in the Army and Navy." Continuing the same paragraph on crackpots, LIFE says: "In Manhattan three hundred people attended a 'Peace Now' rally in Carnegie Chamber Music Hall and applauded speakers who demanded that the U. S. immediately offer 'generous' peace terms to Hitler and the Japs (see pp. 18, 19)." The crackpot paragraph winds up with a report of the thirty persons indicted "on charges of conspiracy to cause mutiny in the armed forces and set up a Nazi regime in America."

No evidence was introduced by respondent to connect Prof. Hartmann in any way with the fascist characters appearing in LIFE as above described. The evidence on the contrary disclosed that LIFE had knowledge that there was no connection. The report given by Miss Faith Fair, researcher for LIFE, admits this. The process of preparing and editing the magazine is that at a staff conference, a researcher is assigned to gather information and material on a subject in which the editors are interested. This may be done in advance of the coverage of the event by reporters and photographers. Miss Fair was assigned to Prof. Hartmann and the Peace Now movement. (R. p. 173) In her report, dated January 7, 1944, to "Butterfield" who was on the editorial staff, she says among other things:

> "Frederick Libby is the keyman and godfather of the Peace Now Organization. . . ." (Ex. U, R. p. 273)
>
> . . .
>
> "The best way we have of linking 'Peace Now' people with the Nazis is through an unsavory character by the name of John Collett, a Norwegian, who left Norway on a Nazi visa in 1940. Collett was discovered

by Mrs. Hutchinson and went in with Libby and Hartmann." (Ex. U, R. p. 273)

. . .

"As far as my informant can tell me, neither Hartmann nor Libby can be definitely linked to any of the indicted seditionists." (Ex. U, R. p. 273)

Prof. Hartmann first saw the January 17th issue of LIFE on about January 16, 1944, when by chance he bought a copy (undeleted) in New York City. He immediately wrote a letter of protest to the editors of LIFE, sending his letter by special delivery. He said:

"Editors,

LIFE Magazine

Sirs:

"May I request an immediate and complete public apology to myself and my associates in THE PEACE NOW MOVEMENT for misrepresenting our policy and program?

"By linking us with groups and personalities whose support our statutes expressly repudiate, you convey a grossly inaccurate picture of our aims and methods; and by prominently printing 'U. S. Indicts Fascists' a quarter-inch above my photograph you are guilty of the crudest kind of character-assassination. The authentic totalitarian technique of bullying and frightening opponents of neo-imperialism into silence is perfectly illustrated by this unprofessional journalistic practice to which you have stooped.

"The absurdity of your editorial blunder of commission (which could never have been made by any one acquainted with my writings and public activities) is increased by your corresponding error of omission in failing to mention that such old-established societies like the National Council for the Prevention of War.

the War Resisters League, and the Fellowship of Reconciliation are also vigorously pushing a wage Peace Now Campaign.

"Your readers are entitled to know that the essential facts about THE PEACE NOW MOVEMENT having headquarters at 15 East 40th St., New York 16, are contained in our official 'catechism' called *Must the Killing Go On?* a dime pamphlet by Dorothy Hutchinson. The best estimate we can make from our own private opinion polls shows that a full third of the American people is already opposed to pursuing this ruinous war to the bitter end and in favor of a quick and decent peace by consultation which might save untold numbers of lives. When so many millions of our fellow-citizens agree with this humanitarian attitude despite the Administration's virtual propagandistic monopoly of the chief media of communication, we are encouraged to believe that a little extra effort will persuade a clear majority of the moral necessity of *Peace Now.*

"In 1917, President Wilson championed a 'peace without victory' and insisted that 'only a peace between equals can last.' Your contemporary TIME in its issue of May 31 printed a letter from Lieut. Davey on active duty in New Guinea favoring a Negotiated Peace and saying, 'Would it not be wise to put out feelers from time to time for the possibility of terms that would be acceptable to both contestants?' My colleagues and I are therefore in good company when we proclaim that *a refusal to consider peace now* is a crime against Humanity. Specifically we welcome the support of all who believe that:

"(1) Peace Now will save our country and the world from the multiplying sufferings and waste of a war to the bitter end;

"(2) Peace Now will prevent a unilaterally dictated, punitive peace which would inevitably lead to World War III;

"(3) Negotiations to stop this war are possible as soon as the United Nations and especially the United States, publish to all the people of the world the precise details of fair and reasonable peace aims on the basis of which they would be willing to suspend hostilities.

"Is it not time we all began to put ourselves in the other fellow's place, to act the part of the Christian and democratic nation we profess to be, and to require Congress and the President to apply the Golden Rule in international affairs?

Sincerely

George W. Hartmann, Chairman,
The Peace Now Movement
15 East 40th Street
New York 16, N. Y."

(Exs. C-1, C-2, R. p. 258)

No answer was made to Prof. Hartmann personally. What LIFE did was to emasculate Prof. Hartmann's letter (Ex. C-1, C-2, R. pp. 258-9) and print the remains in its issue of February 7, 1944 at page 11 together with further comments by the editors. (Ex. B, R. pp. 256-257) These comments are the basis of plaintiff's allegations in Count II of his complaint.

Repercussions came fast to Prof. Hartmann after the LIFE articles. In May, 1944, he was dismissed from his professorship at Columbia University where he had permanent tenure and from Harvard University where he was lecturing and researching on Sabbatical leave from Columbia. In his professional relations he noticed changes. His students became distant and cool where before they had been warm and friendly. Jewish students, especially, began to ask just exactly what he stood for. School children nagged his daughters and the family relationship became

strained. He received threats and anonymous phone calls. Lecture engagements fell off or were cancelled. (R. pp. 61, 62, 63)

After his dismissals from his professional work, Prof. Hartmann suffered a nervous collapse and was ordered to Baldpate Sanatorium near Boston for medical treatment and rest. He had become sleepless, restless, distressed and unable to carry on his usual duties. He remained in the sanatorium from May 28 to July 13, 1944 and was not able to resume normal activities until after a further rest period. (R. pp. 64-65)

By December 1944 he was sufficiently recovered to begin the fight to get his job back at Teachers College, Columbia University. He contacted Dean Russell who told him that he (the Dean) had to act and act quickly to get rid of him because of outside pressure to get rid of that man Hartmann. In his deposition Dean Russell was evasive as to his reasons for firing Hartmann. Prof. Hartmann demanded immediate restoration to his teaching duties but was refused and was told that he would be an administrative risk for at least 5 years. (R. pp. 65-66)

Prof Hartmann then submitted his case to the National Office of the American Association of University Professors of which he was a member. They appointed their committee "A" on his case. (R. p. 66) This is the committee with power to suspend universities and place them on a black list for violations of academic freedom. After several conferences with Dean Russell, committee "A" had to issue an ultimatum to him. Following this Professor Hartmann was restored to his regular duties at Teachers College beginning December 1, 1945 but from June 1, 1944 to December 1, 1945 Prof. Hartmann received no salary from Columbia University. From the time of his reinstatement to the present he has remained at Teachers College as Professor of Educational Psychology. (R. p. 66)

In his complaint Dr. Hartmann demanded damages of the defendant The American News Company for distributing approximately 1,930,763 copies of the offending issues of LIFE magazine in Wisconsin and elsewhere. The suit was started in the State Court and removed to the U. S. D. C. on the grounds of diversity of citizenship.

The American News Co. is a Delaware corporation with its principal mailing office in New York City, a legal department in Stamford, Connecticut, and a large distribution center in Chicago with a smaller one in Philadelphia. It has 235 branch offices scattered in every city of any size in the United States, including No. 99 at Madison, Wisconsin, and in foreign countries. From these local agencies, it services newsstands. (R. p. 184)

The American News Co. is the chief distributor of LIFE Magazine. LIFE is edited by Time, Inc. of New York, in New York City. Copy is sent to Chicago, where plates are made and the printing done by R. R. Donnelly and Sons, except for the relatively few copies printed in Philadelphia. Time, Inc. of Delaware, owned by Time, Inc. of New York, operates in Chicago. It supervises all the printing there and the distribution of subscriber copies by mail. (R. pp. 201-202)

The American News Co. receives the copies of LIFE in bundles of 35-70 copies from the printers beginning on Tuesday of the week preceding the issue date. The issue of January 17, 1944, was received by respondent beginning January 11th and distribution continued up to and including January 14th. Respondent ships LIFE worldwide by trains, trucks and ships. (R. p. 185)

Respondent at the trial offered evidence that it knew nothing of the contents of either issue of LIFE magazine complained of by petitioner and that it was not customary among distributors to examine the contents of magazines distributed by them. Mr. William A. Eichorn, Executive

Vice President of The American News Co., testified that in line with this policy respondent made no efforts to learn of, nor was it notified of, the contents of either issue of LIFE and that it had no working relationship with the publishers of LIFE by which it would be so informed of or protected against distributing libelous material and that specifically it had received no notice from Time, Inc., either of New York or Chicago not to distribute the undeleted copies of LIFE dated January 17th in which Prof. Hartmann was reported as having been indicted. (R. pp. 182, 193, 194)

Respondent, in contradiction to this defense, assumed the role of editor and alleged in its amended answer two other defenses (a) that of justification (truth) and (b) conditional privilege (fair criticism) (R., pp. 12, 22-23). Respondent, however, introduced no evidence of the indictment of petitioner, nor of his connection with the fascist characters, but much evidence irrelevant and immaterial to the general issues was introduced over objection.

Petitioner claimed compensatory damages against the defendant for the injury to his character, professional reputation, loss of his academic positions and his health.

The jury returned a general verdict for respondent.

Petitioner moved for judgment notwithstanding the verdict or in the alternative for a new trial which motions were denied and this appeal taken from judgment entered on the verdict dismissing petitioner's complaint.

Contested Issues

1. The trial court properly stated in denying motion for summary judgment that a crime had been imputed to petitioner (*Hartmann* v. *The American News Co.*, 69 F. Supp. 736) which was libelous *per se* but improperly reversed itself and committed an error of law in ruling on motions after verdict that the libel was not one of law (R. pp. 375-376)

2. The trial court refused the instructions offered by petitioner numbered 2, 3, 4, 8, 11, 12 and 14 which properly stated the law of libel *per se*. (R. pp. 233-238)

3. The court erred as a matter of law by improperly instructing the jury as to libelous matter and the burden of proof. (R. pp. 220-221)

4. The court erred in refusing to instruct the jury properly as to the law of justification by truth in libel actions. It refused petitioner's instructions Nos. 11, 12, 13 (R., pp. 236-237) and improperly instructed the jury (R. pp. 221-222) that the burden of proof is on petitioner and that the substantial truth only need be proved. (R. p. 224)

5. The court gave contradictory instructions in that it placed the burden in one instruction upon petitioner to prove "by a preponderance of the evidence that the language used in either or both of the articles in question was untruthful" (R., p. 222) and in another on respondent to prove its defenses of truth and fair criticism. (R. p. 225)

6. Respondent having failed to establish the truth of the matters charged was no privileged to comment and the court erred in not giving petitioner's requested instruction No. 15 (R. p. 238) and erred in instructing the jury that petitioner became the object of fair comment because of war. (R. p. 224)

7. Respondent as a distributor not knowing or caring about the writing and editing of the articles complained of is, ipso facto, not privileged. (R. p. 178)

8. Malice is presumed from the distribution of matter libelous *per se* and the court erred in refusing to give petitioner's requested instruction No. 14 (R., p. 237).

9. The trial court erred as a matter of law in holding respondent to ordinary care in its instructions (R., pp. 222-223) and refusing to give petitioner's requested instructions No. 9 (R., p. 236).

10. Custom of others in the industry is not a standard of care in libel cases and the court erred in so instructing the jury R., p. 223) and refusing petitioner's requested instructions No. 17 (R. pp. 238-9).

11. The Court erred in receiving evidence of custom objected to by petitioner from Mr. Holbrook (R., p. 189) and Mr. Heiskell (R. pp. 179, 180, 181) and others.

12. The trial court erred in admitting evidence that John Collett was convicted of voyeurism. (R. pp. 73-74)

13. Mr. Heiskell, officer of Time, Inc., was permitted over the objection of petitioner to give opinion evidence as to the influence of Peace Now literature on Germany and Japan. (R. p. 177)

14. The court erred in admitting hearsay, slanted and unreliable evidence known as the Dies Committee report Ex. 57. (R. p. 84)

15. It was reversible error for the court to admit over petitioner's objection, Ex. 54 (R., p. 137) an article in Newsweek Magazine dated February 7, 1944, which petitioner did not write nor believe.

16. The record of John Dutko (Ex. 130, R. p. 107) was inadmissible, being immaterial, and offered for the purpose of prejudicing the jury.

17. Exs. 134 and 135 (R. p. 123) were erroneously admitted, they being immaterial and irrelevant.

18. The speech of President Roosevelt, Ex. 144, was immaterial and irrelevant and highly prejudicial and its admission constitutes reversible error.

19. Complaints in other actions against other defendants were immaterial and it was error to admit them. (Ex. 72, 73, 74, 75, 76, 77, 78, 79, 80, 84, 86)

20. Clippings from other papers and magazines other than LIFE were immaterial (Ex. 56, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71) (R. p. 208) and inadmissible in mitigation of damages.

21. It was error for the court to refuse petitioner's requested instruction No. 6 (R. p. 235) on credibility after having admitted in the record the evidence set out in the preceding 2 points above.

22. Petitioner offered instruction No. 7 (R., p. 235) defining his constitutional rights of free speech and it was error to refuse it.

23. The court refused properly to instruct the jury in accordance with petitioner's requested instructions Nos. 20 and 21. (R. p. 240)

24. The verdict of the jury is against the weight of the evidence and cannot stand.

25. Passion and prejudice influenced the jury.

26. The judgment must be reversed or a new trial granted in the interests of Justice.

Propositions of Law Relied On

1. Defamatory matter falsely imputing the commission of a crime, or indictment for a crime, is libelous as a matter of law.

Williams v. *Hicks Printing Co.*, 159 Wis. 90, 100; 150 N. W. 183;
Pellardis v. *Journal Printing Co.*, 99 Wis. 156, 74 N. W. 99;
McAllister v. *Detroit Free Press*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, 331, 332, 333, 336;
Hartmann v. *Am. News Co.*, 69 F. Supp. 736.

2. Defamatory matter which falsely imputes fascist activities, subversive activities, undercover activities and disloyal activities holds another up to public contempt, hatred and ridicule and is libelous as a matter of law.

Putnam v. *Brown*, 162 Wis. 524, 530, 155 N. W. 910;
Spanel v. *Pegler*, 160 F. 2d 619;
Holden v. *American News Co.* (1943) Wash. 52 F. Supp. 24, appeal dismissed 144 F. 2d, 249;
Pullman Standard Car Mfg. Co. v. *Local Union* 2928, (CCA 7th) Ill. 152 F. 2d 493.

Truth to be a justification [must be true] *at the time of writing*, must be known by the author to be true and must be as broad as the charges made.

Massuere v. *Dickens*, 70 Wis. 83, 35 N. W. 349;
Stevens v. *Morse*, 185 Wis. 500, 201 N. W. 815;
Wms. v. *Journal Co.*, 211 Wis. 362, 247 N. W. 435.
Restatement of the Law of Torts, Vol. 3, sec. 582 (f).

Conditional privilege attends only to a true statement of facts and never extends to contemptuous, humiliating or degrading remarks nor to gibes, taunts and insulting phrases.

Buckstaff v. *Viall,* 84 Wis. 129, 54 N. W. 111.

Conditional privilege is more limited in Wisconsin than elsewhere.

Walters v. *Sentinel Co.,* 168 Wis. 196, 169 N. W. 494.

Conditional privilege does not extend to false statements made of a private citizen merely because it may relate to some public matter.

Pfister v. *Mil. Free Press Co.,* 139 Wis. 627, 640, 121 N. W. 938.

Distribution of defamatory matter libelous as a matter of law, without justification, assumes malice and entitles plaintiff to compensatory damages.

White v. *Nichols,* 44 U. S. 266, 3 How. 266, 11 L. Ed. 591;
Luech v. *Berger,* 161 Wis. 564, 155 N. W. 148;
Putnam v. *Browne,* 162 Wis. 524, 155 N. W. 910.

The defendant is not relieved from liability because of ignorance of the contents of magazines distributed by it.

Street v. *Johnson,* 80 Wis. 455, 50 N. W. 395, 14 LRA 203, 27 Am. St. Rep. 42;
Peck v. *Tribune,* 214 U. S. 185, 29 S. Ct. 554, 555, 53 L. Ed. 960, 16 Ann. Cas. 1075;
Holden v. *Am. News Co.,* 52 F. Supp. 24;

McAllister v. *Detroit Free Press,* 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, 331, 332, 333, 336.

Business custom cannot override the general law and relieve defendant from liability for its negligence.

Harrington v. *Edwards,* 17 Wis. 604.

The defendant was grossly negligent by failing to exercise the degree of care required under the circumstances.

Yoshizawa v. *Hewitt,* 52 F. 2d 411, 79 A. L. R. 317.

The admission of Ex. 57, the Dies report, was highly prejudicial and requires a reversal of the judgment.

Carpenter v. *N. Y. Evening Journal,* 96 App. Div. (N. Y.) 376, 379, 89 N. Y. Supp. 263;
Throckmorton v. *Evening Post Pub. Co.,* 27 App. Div. (N. Y.) 125, 127, 50 N. Y. Supp. 153;
Commonwealth v. *Slaviski,* 245 Mass. 405, 415, 417, 140 N. E. 465;
Wms. v. *Hicks Printing Co.,* 159 Wis. 90, 100, 150 N. W. 183;
Wigmore, Evidence, Vol. 5, 3rd Ed. (1940) sec. 1661;
Gaines v. *Relf,* 12 How. 472;
Richardson on Evidence, 6th Ed. (1944) p. 546;
Sturla v. *Freccia,* L. R. 5 App. Cas. 623.

The admission of newspaper and magazine articles, complaints in other libel actions against other defendants and other records and the speech of Pres. Roosevelt was highly prejudicial and requires reversal.

Palmer v. *Matthews,* 162 N. Y. 100, 102, 56 N. E. 501;
Schiefel v. *State,* 180 Wis. 186, 192 N. W. 386;
Hallam v. *Post Pub. Co.* (1893), 55 Fed. 456, aff'd 8 CCA 201;
Smith v. *Sun Printing & Pub. Ass'n.,* 55 Fed. 250.

A verdict which is against the evidence or against the weight of the evidence cannot stand and the judgment must be reversed or a new trial granted.

Moak v. Bourne, 13 Wis. 515;
Pleasants v. *Fant,* 89 U. S. 116, 22 Wall. 116, 22 L. Ed. 780.

A verdict of the jury which is the result of passion and prejudice cannot stand and the judgment must be reversed or a new trial granted.

Birchard v. *Booth,* 4 Wis. 67.

A new trial may be granted in the interest of justice and the court should fairly and courageously exercise its discretion where the verdict is manifestly wrong.

ARGUMENT

I.

Defamatory matter falsely charging that petitioner had been indicted as a fascist; that he was a fascist like the seditionists indicted and like the characters in "Under Cover" and the leader of a subversive movement is clearly libelous per se and is a matter of law for the court and entitles petitioner to compensatory damages. It is reversible error for the trial court not to so rule and to refuse to instruct the jury accordingly.

The possession of a good reputation is one of the greatest assets a human being can have. This is the attitude of the people of Wisconsin as well as the Courts of Wisconsin and because, as the trial court properly ruled, the Wisconsin law of libel governed the within case so far as actionable wrong is concerned, *Hartmann* v. *The American News Co.*, 69 F. Supp. 736, citing *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, the attitude of the people and Supreme Court of Wisconsin is important.

The Wisconsin Court took occasion to discuss the subject of reputation in *Williams* v. *Hicks Printing Co.*, 159 Wis. 90, 100, 150 N. W. 183, and remarked there that:

> "In the field within which libelous activity may operate, great wrongs may be perpetrated, resulting in loss, sometimes beyond the competency of legal remedies to fully redress . . . 'Character,' continues the Court, 'is man's choicest treasure. . . .' "

A. Petitioner, Prof. George Hartmann, as a proposition of law submits that written defamatory matter is libelous as a matter of law if it falsely imputes the commission of a crime to another or holds him up to public hatred, contempt, ridicule, aversion or disgrace. And furthermore matter clearly libelous is a matter of law for the court, the jury having only the function of fixing compensatory damages.

The most serious libel that can be made of another is that which imputes a crime to him, or imputes criminal conduct to him. A false charge of such a nature is clearly libelous as a matter of law.

The report that petitioner has been indicted is in law equivalent to a charge that he had committed a crime for it is generally held that a report of arrest, indictment, conviction or imprisonment for a crime is equivalent to an imputation of the commission of such a crime, 53 *C. J. S.*, sec. 54, citing *Jones* v. *Townsend,* 21 Fla. 431, 58 Am. R. 676 in which it was held that to publish that plaintiff is under indictment for not canceling stamps on an empty liquor cask, the contents of which he had sold, was the imputation to him of a crime. *Newell, Slander and Libel,* p. 119; p. 968.

A charge of criminal conduct involving crimes much less serious than treason and sedition is libelous under Wisconsin law as for instance a charge of larceny, embezzlement, robbery or violation of the game laws. The words that "he is a swindler and thief and stole eight thousand dollars from me" were actionable, *Stern* v. *Katz,* 38 Wis. 136, and also a charge that another was guilty of hunting within the prohibited season. *Mallon* v. *Tonn,* 163 Wis. 366, 157 N. W. 1098. The publication in a newspaper of a false statement that the plaintiff has been "recently released from federal prison at Madison, having served a

term for counterfeiting" was actionable, *Pellardis* v. *Journal Printing Co.*, 99 Wis. 156-7, 74 N. W. 99, the Wisconsin Supreme Court holding that such a statement was clearly libelous and the trial court did not err in instructing the jury that "in so far as the publication implies that the plaintiff had been convicted and punished for counterfeiting, it is defamatory and libelous and *she is entitled to a verdict in her favor.*" (The italics are added.) Also see *McAllister* v. *Detroit Free Press*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, which held that the false imputation of a crime is clearly libelous as a matter of law and only question for jury is one of damages.

Certainly if it is libelous to impute to another the violation of a game regulation, it is libelous falsely to charge that another had been indicted for treason or sedition, or was the leader of a subversive movement, especially in time of war. And the Arizona courts along with others have so held, *Arizona Publishing Co.* v. *Harris*, 20 Ariz. 446, 181 P. 373.

It needs no argument to prove that LIFE magazine in its issue of January 17, 1944, by its caption over plaintiff's picture: "U. S. Indicts Fascists (continued)" (Ex. A-5) imputed to petitioner the crime of treason or sedition in time of war. The "continued" referred to the preceding pages in which the picture display, headlines and text reported on the 30 indicted fascist seditionists, their history and activities. This charge of indictment was circulated in 1,550,000 copies of LIFE, of which the defendant distributed the largest share.

That the charge of indictment was clearly false has been admitted by respondent. In the issue of LIFE, dated February 7, 1944, at page 11, (Ex. B) the editors stated that of course it was untrue that Dr. Hartmann had been indicted. This statement was not a retraction in compliance with the laws of Wisconsin, sec. 331.05(1) because

it appeared in smaller type, in a less conspicuous place than the original article and was published not in the next succeeding issue or within five days but three issues and three weeks later. Respondent made no claim that it was a retraction.

That LIFE realized its legal liability appears from the teletype communication of Jan. 11, 1944 (R. pp. 171-172) to its Chicago office commanding that the caption be routed regardless of costs because "This is a legal matter." The testimony of Andrew Heiskell admits that LIFE had no evidence that Hartmann had been indicted. (R. p. 181)

But no effort was made by LIFE, nor The American News Co., defendant, to stop the 1,550,000 undeleted copies from being sent into Wisconsin and into the far corners of the world.

The Honorable F. Ryan Duffy, Judge, who presided at the trial herein, in denying respondent's motion for summary judgment stated:

> "In this case plaintiff was accused of having been indicted by the United States Government. Published printed matter which imputes the commission of a crime by an individual is libelous *per se.*" *Hartmann v. The American News Co.*, 69 F. Supp. 736 (1947).

The trial judge, however, did not cleave to this opinion and in denying petitioner's motion after verdict, said:

> "I think, perhaps, the plaintiff in this case has some ground for complaint in reference to the statement that I made in the opinion denying the defendant's motion for summary judgment. That sentence on the last page of the opinion might well be construed as deciding the law of the case as far as that the plaintiff was accused of having been indicted by the United States Government. It was not intended

in that manner. It was intended merely to state what the law was as the court saw it, that published printed matter which imputes the commission of a crime to an individual is libelous *per se*. When it came to the trial of this case I considered that the whole situation, the article viewed in the entirety might well be construed by a person of average intelligence to the contrary, and I therefore submitted that issue to the jury . . . " (R. pp. 375-376)

The court in this remark revealed the error of law into which it had fallen for it is contrary to the authorities in Wisconsin and elsewhere. They hold that falsely to accuse another of criminal conduct is libelous as a matter of law and entitles the plaintiff to compensatory damages.

B. In both the deleted and undeleted copies of LIFE magazine of January 17, 1944, respondent distributed defamatory matter concerning petitioner which held him up to public hatred, degradation, ridicule and contempt which was clearly libelous and therefore libelous as a matter of law. Petitioner is entitled to compensatory damages for the distribution of the deleted as well as the undeleted copies of LIFE.

In the deleted copies of LIFE, the caption over petitioner's hairline is omitted but in all other respects the copies are the same. The headings, the reference to Joe McWilliams, the quotations out of context, the distortion of the pictures of petitioner and the other participants in the Carnegie Hall meeting and the cross reference to pages 15-17 in which the fascist seditionists and "Under Cover" characters were displayed, as well as the index line and the "crack-pot" paragraph are identical in both the deleted and undeleted copies. The time is the same, that of January 17, 1944, when war fervor was tense and the people easily frightened by "Under Cover" characters.

Under the law, such defamation is clearly libelous. It is a long standing general rule of law which also prevails in Wisconsin that defamatory matter libelous as a matter of law includes not only false charges of criminal conduct but also matter calculated to subject the plaintiff to public hatred, contempt, ridicule and public aversion. This rule begins in Wisconsin with *Bradley* v. *Cramer*, 59 Wis. 309, 18 N. W. 268 and continues through *Williams* v. *Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183, down to the present time.

Where a newspaper editor made a thinly veiled comparison of a candidate for judicial office to Judas Iscariot, the Wisconsin Supreme Court held that it required *no argument* to prove that this was a jibe, a contemptuous insult and hence clearly libelous as a matter of law, saying:

> "Being libelous on its face, the only question to be submitted to the jury in connection with it is the question of the amount of damages" *Putnam* v. *Browne*, 162 Wis. 524, 530, 155 N. W. 910.

In a case subsequent to *Putnam* v. *Browne* and in line with it, the Wisconsin Supreme Court decided that the principal error and the one requiring reversal was that the trial court should have, but did not, declared as a matter of law that the newspaper articles complained of by the plaintiff were libelous and should have submitted to the jury the question of damages under an instruction that the plaintiff had been libeled and was entitled to substantial damages. *Williams* v. *Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183:

The plaintiff, Williams, was a lawyer of long and high standing in the City of Oshkosh, Wisconsin. He was attacked by the defendant's newspaper, the Northwestern, in which he was accused of being "entirely ignorant of the first principles of decent courtesy or fairness," of

"strutting for a few brief moments in the public eye," of being a "puny little member of the bar" and of many other improprieties. The jury found a verdict for the defendant. The conduct of the trial court was severely criticized by the Supreme Court. It said: (p. 103)

> "As no justification was shown and the mitigating circumstances, if there were any, had no bearing on actual damages * * * and there was no evidence to indicate appellant's character was not such as would be affected in the ordinary degree by such a wrong, while there was affirmative evidence that the degree of injury was, quite likely, above the ordinary, it was error for the trial court to refuse to instruct the jury that he was entitled to recover his actual damages and regardless of the question of whether the publication was made with bad motives or not. The jury should have been so instructed and, to guard against their committing error by finding merely nominal damages, they should have been made to appreciate that nothing short of substantial damages within the field of general damages, would be adequate to the case. The law presumes, in such a case, that such damages were suffered as naturally and ordinarily flow from such a wrong under such circumstances. The standing of the injured one in the community is to be taken into consideration, his social station and relations, his business and its character, and all other circumstances bearing on the question. These are called general damages. There is no standard of law by which the loss in respect to such matters can be measured but the sound judgment of a constitutional jury under proper judicial guidance.
>
> "The trial court instructed the jury: 'It is for you to determine whether the charges have been proven and were published from good motives and justifiable

ends.' That was error as has been indicated. The pleaded justification was not established in any substantial degree, and the jury should have been so plainly instructed instead of being left to find to the contrary and thus prevent appellant from obtaining the redress he was entitled to."

In some jurisdictions the question of libel *per se* has arisen on demurrer before trial, but in all the cases cited in the next succeeding paragraphs, the language has been held actionable.

In view of the intense national anti-German feeling in war time, the United States District Court in Idaho held that the publication of a news article referring to another as a "New Deal Gestapo spying on his neighbors as they are doing in Germany," constituted libel *per se* (*Browder* v. *Cook* (1944), 59 F. Supp. 225), while in New Jersey to liken a candidate to Hitler and Hirohito was held libelous. *Hartley* v. *Newark Morning Ledger Co.* (1946), 134 N. J. L. 217, 46 A. 2d 777.

The Missouri courts held during the first World War that the charge of being pro-German was actionable *per se*. *Seested* v. *Post Printing and Publ. Co.* (1930), 326 Mo. 559, 31 S. W. 2d 1045.

"Pro-Nazi" has a definite meaning says the Texas court as one who believed in and sympathized with the political party then in control of the government of Germany with whom this country was at war, and a "pro-Nazi" was one who favored Germany in the war over the United States. The assertion that a citizen of this country was "pro-Nazi" would be libelous *per se*. *Goodrich* v. *Reporter Publishing Co.* (1946), 199 S. W. 2d 228.

Imputations questioning the patriotism and loyalty of another, or imputations that he is a seditious agitator

have been held actionable *per se*. *Wilkes* v. *Shields*, 62 Minn. 426, 64 N. W. 921; *Devany* v. *Quill*, 184 Misc. 698, 64 NYS 2d 733; *Hryhorijiv* v. *Winchell* (1943), 180 Misc. 575, 45 NYS 2d 31; *Holden* v. *American News Co.* (1943), Wash. 52 F. Supp. 24, appeal dismissed 144 F. 2d 249; and *Albi* v. *Street & S. Pub.* (1944), (CCA 9th) Washington, 140 Fed. 2d 310; *Luotto* v. *Field* (1944), 49 NYS 2d 785, 249 N. Y. 460, 63 N. E. 2d 58.

At least twice recently, the United States Circuit Court of Appeals for the 7th Circuit has passed upon libelous articles: *Pullman Standard Car Mfg. Co.* v. *Local Union* 2928 (Ill.) 152 F. 2d 493 and *Spanel* v. *Pegler*, 160 F. 2d 619. In the first case the patriotism of the plaintiff was attacked and in the second case the plaintiff was accused of being a communist, or communist sympathizer. Both were held to be cases of libel *per se*.

In the *Spanel* case it was further held that the effect rather than the form of the language must be evaluated. "Positive assertion of a charge is not necessary to constitute a writing libelous; they may be made in the form of insinuation, allusion, irony or questions, and the matter will be as defamatory as if asserted in positive and direct terms," the court said.

The cloak cut from the pattern of the cases reviewed above certainly more than fits the Hartmann case here. The insinuation made of the plaintiff Putnam that he was like Judas Iscariot was indeed mild compared to the character which LIFE magazine gave the plaintiff here. He was identified with at least 30 indicted fascists and seditionists. Such a charge is not the mere violation of gaming laws, which the Wisconsin Supreme Court has held libelous *per se*, nor is it merely the charge of being a "puny little member of the bar" which the same court has also condemned. The mildest charge made of Hartmann was that he was pro-fascist and unpatriotic, charges which the

Idaho, New Jersey, Minnesota, Washington, New York and the U. S. District and Circuit Courts of Appeal have justly condemned.

If petitioner, Hartmann, was truly and in fact such an infamous character as made out in LIFE, one can legitimately ask, where was the FBI? Also, where was the author of "Under Cover" that he himself failed to ferret out such a person especially when Prof. Hartmann had previously made his pacifist stand a public issue in the New York mayoralty race in 1941 when Derounian, alias John Roy Carlson, was gathering his material? The defendant was unable to show that Carlson so much as mentioned the plaintiff.

In fact, respondent made no real attempt to prove that petitioner had any connection with the indicted fascists whose pictures appeared in juxtaposition to his. In the deposition of Irving Haberman, (R. p. 205) who was a photographer from PM, then of pinkish tinge and a "lying publication" (R. p. 121) the lone defense witness on the subject, he merely testified that Prof. Hartmann was a talker "similar to McWilliams using the same gestures and similar oratory."

Petitioner himself testified that he had never so much as heard Joe McWilliams speak and that his oratorical style, if any, might better have been compared to William Jennings Bryan or Norman Thomas. (R. p. 152)

No one connected with writing or publishing "Under Cover" was called to identify the plaintiff and not one of the characters mentioned, nor was any one else, called to connect petitioner with the undercover activities of the fascists or seditionists. No fascist organization membership rolls were produced and no "spy" witnesses, although the plaintiff testified that the files of Peace Now had been rifled by someone (R., p. 152). Respondent made no

explanation whatever of the reason for the reference in the middle of page 18 (Ex. A-5) "see pages 15-17" which tied petitioner with the fascist seditionists.

Even the Dies Committee report, (Ex. 57) which the defendant was erroneously allowed to introduce into evidence over the objection of petitioner and which is discussed hereinafter, had no bearing on and made no connection between petitioner, or Peace Now, and the fascist seditionists in LIFE.

Nor did the record of Collett whom LIFE's researcher suggested as a smear carrier, *i.e.*, a person who contaminates another by association, connect Collett or petitioner with the undercover, underground fascist characters in LIFE or their cohorts. (What Collett's record actually showed was that he left Norway after the Nazi invasion through the help of the Russian Ambassadress, her help having been obtained by a mutual friend; that he crossed Russia and entered the United States at San Pedro, California, on a business mission and that while in California he attended Whittier College, a Quaker College; that he then decided to forego business for work in the interests of international peace because he was a pacifist; that he had been cleared by both the FBI and War Department and had applied for his first citizenship papers in October, 1943. (R. pp. 69, 70, 71, 72) In the spring session of 1945, he attended Teachers College, Columbia University on a Dean's scholarship. (R. p. 215))

C. Respondent having failed to justify the defamatory matter it circulated by evidence of truth, was not conditionally privileged, nor was respondent, if an independent contractor, conditionally privileged in any event.

The complete failure to prove the charges made of petitioner doomed any defense of jurisdiction by truth. A

defense of truth requires that the facts be true at the time they were written and that the author know the truth whereof he writes. "Restatement of the Law of Torts," Vol. 3, sec. 582 (f), page 218. The general rule stated there is:

> "The truth of a defamatory imputation of fact must be established as of the time of the defamatory publication. Facts alleged to exist by the defamer may subsequently occur, but his foresight or luck in anticipating them will not protect him from liability for stating their pre-existence."

For instance, in Wisconsin, a newspaper editor who printed in his paper that the plaintiff was a "skunk" and engaged in low business practices was not entitled to introduce into evidence conversation of the plaintiff of which the defendant was ignorant at the time of the publication. *Massuere* v. *Dickens,* 70 Wis. 83 (1887), 35 N. W. 349. Strangely enough this rule worked in favor of the editor in *Williams* v. *Journal Co.,* 211 *Wis.* 362, 247 N. W. 435.

Respondent by attempting to prove the truth of isolated statements made of petitioner, did not meet the test of truth laid down in *Stevens* v. *Morse,* 185 Wis. 500, 201 N. W. 815 and *Spanel* v. *Pegler,* (CCA 7th) 160 F. 619 where it was held respectively that the truth must be as broad as the charges and that the general tone and effect rather than the form of the language was important and that insinuation, allusion, irony or questions may be as defamatory as direct statements.

Respondent offered as a further defense that the material in LIFE was conditionally privileged and comments made thereon did not exceed fair comment. For two reasons this defense failed: (a) the law requires that the truth be established before any comment is privileged and the truth not being established here and the comments

being clearly contemptuous, humiliating and degrading the comment was not fair and (b) respondent claimed to be an independent contractor, not an editor, and without any knowledge of the articles until after distribution of them.

Conditional privilege is more limited in Wisconsin than elsewhere and never extends to untruthful accusations of crime, or untruthful insinuations, or imputations, of criminal conduct, or untruthful or scandalous or contemptuous expressions. *Walters* v. *Sentinel Co.*, 168 Wis. 196, 169 N. W. 494, *Stevens* v. *Morse*, 185 Wis. 500, 201 N. W. 815, *Ruhland* v. *Cole*, 143 Wis. 367, 127 N. W. 959 and *State* v. *Herman*, 219 Wis. 267, 262 N. W. 718.

Captions and headlines are not privileged. Wis. Statutes, sec. 331.05(1).

An editor under some circumstances may offer in defense, *if he has printed the truth*, that his own remarks and comments were privileged and he did not exceed the bounds of fair criticism; but no privilege extends to contemptuous, humiliating and degrading remarks nor to gibes, taunts and insulting phrases. (Mr. Buckstaff cannot be referred to as Mr. "Bucksniff," *Buckstaff* v. *Viall*, 84 Wis. 129, 54 N. W. 111.) Neither does conditional privilege extend to defamatory statements of a private citizen merely because of some public interest in him or his activities. *Pfister* v. *Milwaukee Free Press Co.*, 139 Wis. 627, 640, 121 N. W. 938, *Burt* v. *Advertiser News Co.*, 154 Mass. 238, 28 N. E. 1; *Park* v. *Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731.

The defenses offered by The American News Co. rendered it a split personality. It assumed the role of the editor, claiming his defenses, then assumed the role of an independent distributor who "knew nothing" and cared nothing of the writing, editing and printing of the magazine. This schizophrenic approach confused the court and the jury and produced reversible error.

According to the testimony of Mr. Eichorn, executive Vice-President of respondent, respondent does not preview the magazines it distributes and "knows nothing" of their contents; that it had no working relationship with either Time, Inc. of New York or Delaware by which it would be informed of the contents of the LIFE magazine.

Quaere: How could a distributor who knows nothing of an article until after distribution be in a position to know true facts and make fair criticism at the time of writing?

Answer from common sense: It could not.

D. Respondent having distributed imputations and charges of petitioner which are clearly libelous as a matter of law and having failed to justify the charges, petitioner is entitled to compensatory damages.

Distribution of defamatory matter which is clearly libelous of petitioner, entitled him to compensatory damages as a matter of law. *Williams* v. *Hicks Printing Co.*, 159 Wis. 90, 150 N. W. 183, *Luech* v. *Berger*, 161 Wis. 564, 155 N. W. 148, *Putnam* v. *Browne*, 162 Wis. 524, 530, 155 N. W. 910. Malice is presumed in such cases and compensatory damages follow as a matter of law without proof; *White* v. *Nichols*, 44 U. S. 266, 3 How. 266, 11 L. Ed. 591; *Corrigan* v. *Bobbs Merrill Co.*, 228 N. Y. 58, 126 N. E. 260, 10 A. L. R. 662.

The publication of actionable words and charges presumably injure the one of whom they are made and he is entitled as a matter of law to such compensatory damages as naturally flow from the injury sustained. His compensatory damages include mental suffering, loss of friends and place in society, loss of professional standing, income and profits including unemployment and expenses incurred by reason of the libel. *Washington Times Co.* v. *Bonner*, 86 F. 2d 836, 66 App. D. C. 280, 110 A. L. R. 393; *Pellardis* v.

Journal Printing Co., 99 Wis. 156, 74 N. W. 99 and *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627, 121 N. W. 938.

Petitioner submits that the trial court erred as a matter of law in refusing to give petitioner's requested instructions as follows: 2, 3, 4, 7, 8, 11, 12, 13, 14, 15, (R. pp. 233-238 incl.) and in giving instructions appearing on pages 220-221 of the record and that the errors of law and fact entitle petitioner to have the judgment reversed or a new trial granted.

II.

The respondent, the American News Co., owed petitioner the duty to exercise extraordinary care not to injure him by distributing libelous matter and the trial court erred as a matter of law in not so holding and so instructing the jury.

Respondent took the position at the trial that it was an *independent* wholesale distributor of magazines. It is the largest distributor in the United States and distributes nearly all of the leading popular magazines that appear on the newsstands. Mr. Eichorn testified that the defendant took on LIFE for distribution because it believed that Time, Inc. was a reputable company; that subsequent to the taking on of a magazine there was ordinarily no further relationship with the editors and publishers. (R. pp. 194, 195, 199, 207)

As an excuse for this negligent and indifferent attitude, respondent contended that the speed of modern distribution and the magnitude of it made it inexpedient for the distributor to know the contents of magazines distributed. (R. pp. 190, 193)

Respondent did not dispute the general rule of law that "where a libel is published in a newspaper, or book, every one who takes part in publishing it, or in procuring

and publishing it, is *prima facie* liable," as Gatley (Libel and Slander in Civil Action, pp. 102-103) states, but relied on the Wisconsin case of *Street* v. *Johnson*, 80 Wis. 455, 50 N. W. 395, 14 LRA 203, 27 Am. St. Rep. 42 for its defense.

The *Street* case was decided in 1891 before large scale distribution existed. The facts there were that the defendant Johnson was a small individual news peddler in the City of Superior, Wis. He peddled the Sunday Sun, a local newspaper, which contained matter allegedly libelous concerning some of the women in the local W. C. T. U. The Wisconsin court in ruling on demurrer said that the mere seller of newspapers is not liable if not negligent.

If the *Street* case is analyzed it appears that the defendant was a small time, one-stand peddler without investigational facilities of any kind; that the burden of proof was placed upon him to prove (a) that he did not know of the libel (b) that his ignorance was not due to any negligence on his part and (c) that he did not know and had no ground for supposing that the paper was likely to contain libelous matter.

Respondent, The American News Company, contended that it could step into the shoes of a peddler such as the one-stand Mr. Johnson. This metamorphosis was hard to accomplish because of the facts. In the first place The American News Co. maintains large offices and staff in New York City where news is edited. Its offices actually are within a short distance of the building where LIFE magazine is composed and edited. Respondent is not a single, one-stand news peddler but the largest in the United States with 235 agencies scattered everywhere including foreign countries. It maintains its largest distribution center in Chicago where the actual printing of LIFE takes place and where Time, Inc. of Delaware is located.

Yet respondent admitted that it had no relation with any of these agencies by which it could be notified by telephone, telegraph or teletype to halt even such distribution

as made by it of the undeleted copies of LIFE magazine of January 17, 1944. It admitted that it had no relationship with LIFE's organization by which to learn that Prof. Hartmann had written a letter to the editors of LIFE on January 16th demanding a retraction of its article and that it did not know actually of such a letter and that it did not know that LIFE was intending to print the reply made by it in the February 7th issue. The American News Co. admitted that it made no effort after taking an account on to save itself from the distribution of libelous matter and contended that it had no duty to make any such efforts. (R. pp. 194, 199)

In taking this position, The American News Co. not only failed to square itself with the *Strect* case but, contrary to the *Street* case, took the very callous position that because respondent was big and speedy there was no duty upon it to safeguard the public from libel.

A. Petitioner submits the proposition that speed and expedience do not excuse respondent from liability to him.

This argument of bigness, speed and expediency has been advanced by every big business that has found it difficult to take precautions for the public safety. The railroads made the same arguments against safety regulations and the food processors have argued similarly about health regulations.

And the same argument was made in earlier days by the then growing daily newspaper. Because of the speed with which daily newspapers had to report and print news, they did not find it expedient to check their facts and sources nor the accuracy of their own reporters. The courts have not accepted this excuse. A telling decision of the early period was that of *McAllister* v. *Detroit Free Press*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, 331, 332, 333, 336.

The defendant there, the Detroit Free Press, published a newspaper article confessedly untrue in several particulars all of which tended, in the connection used, to carry the impression that the parties named therein were guilty of felony, which was clearly libelous *per se*, and the court held that defendant was not privileged and that the only question for the jury was one of damages. The court in arriving at its decision said:

> "No newspaper has any right to trifle with the reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business"

without answering for the libel in damages, and, it continued,

> "the greater the circulation the greater the wrong, and the more reason why greater care should be exercised in the preparation of personal items." (p. 322)

A party cannot, it said, be subjected to the wrong and outrage of a false publication of his arrest and imprisonment looking toward his guilt without remedy.

> "And no sophistry of reasoning and no excuse of the demand of the public for news, or of the peculiarity and magnitude of newspaper work, can avail to alter the law . . . so as to leave a party thus injured without any recompense for a wrong which can even now, as the law stands, never be adequately compensated to one who values his reputation better than money." (Pp. 332-333).

In other words, the law does not place a premium on wilful ignorance and carelessness by allowing the defendant to put forward the excuse of size and speed to create legal immunity.

B. Petitioner submits also that the wilful ignorance of respondent does not excuse it from liability to him.

Ignorance has always been a favorite defense of wrong doers and the present case is no exception. Editors and others have sometimes plead the excuse of ignorance. But in the case of *Loibl* v. *Breidenbach*, 78 Wis. 49, 47 N. W. 15, the Court held that one who negligenty signs a libelous article without knowing its contents and delivers it to a person who wrote it without any directions restricting the use to be made of it, is responsible as a participator under the old and well known rule that all who aid, advise, countenance or *assist* the commission of a tort are wrong doers.

Ignorance was the plea of the managing editor, defendant, in *Smith* v. *Utley, et al.*, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620. He alleged that he had no knowledge of the article complained of. The court there said:

> "The law is well settled that the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences, in a civil action for the publication of a libelous article; and this is so whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense."

Ignorance and mistake did not excuse the Tribune Co. In *Peck* v. *Tribune Co.*, 214 U. S. 185, 29 S. Ct. 554, 555, 53 L. Ed. 960, 16 Ann. Cas. 1075, Mr. Justice Holmes said:

> "If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whenever a man publishes, he publishes at his peril.'"

The American News Co., the same defendant as herein, was held liable for the distribution of Pic Magazine in the

City of Spokane, Washington, in the case of *Holden* v. *American News Co.*, 52 F. Supp. 24, and in the companion case of *Albi* v. *Street & Smith Publications*, 140 Fed. 2d 310, the problem of responsibility was discussed.

Judge Schwellenbach of the U. S. District Court said that whether lack of knowledge on the part of the American News Co. is a defense is doubtful in view of *Miles* v. *Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. 2d 847, 849, which involved a radio station.

The Washington Court next cited with approval *Sorensen* v. *Wood*, 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098, which said:

> "It has often been held in newspaper publication which is closely analogous to publication by radio that due care and honest mistake do not relieve a publisher from liability for libel."

C. Petitioner submits that custom of an industry does not relieve respondent from negligence and liability.

In addition to the excuses of speed, expediency and ignorance, the defendant testified by its Vice-President and others over the objections of petitioner that it was the custom among all the distributors not to examine the contents of magazines handled by them. (R. pp. 189-190) This same argument that business practice or custom can nullify the general law has also been advanced before. Again the courts of Wisconsin and elsewhere have not been impressed.

That custom could supplant the law was argued in the case of *Harrington* v. *Edwards*, 17 Wis. 604, by raftsmen on navigable streams against the riparian owners. The defendant owning a vessel and a wharf upon a navigable stream, found a raft of lumber belonging to the plaintiff fastened in the stream so as to obstruct the approach of defendant's vessel to his wharf. He untied the raft and it,

not being in charge of any person, floated away. The plaintiff, owner of the raft, sued. The court held that the defendant was not liable for the loss of the lumber and evidence that by custom raftsmen anchored their rafts regardless of the wishes or convenience of the proprietors of adjoining lands was not admissible and that raftsmen cannot establish a custom among themselves which will override the common law rights of riparian owners.

That custom and usage cannot justify negligence, nor relieve from liability is a rule widely accepted as the following decisions attest: *Am. Coal of Alleghany County* v. *De Wese*, 30 F. 2d 349; *Standard Oil Co. of N. Y.* v. *R. L. Pitcher Co.*, 289 F. 678; *Northam* v. *Boston & Montana Consol. Copper & Silver Mining Co.*, 190 F. 722, 111 CCA 450; *Fletcher* v. *B. & P. R. Co.*, 18 S. Ct. 35, 168 U. S. 135, 42 L. Ed. 411; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 23 L. Ed. 356.

The rule is sound common sense because, if business including magazine distributors was allowed to establish its own laws merely by setting up certain business or trade customs, private law would prevail over public law until one by one all rights of the public would be abrogated.

The argument of respondent herein that because of speed, size and convenience the large distributors of magazines customarily take no responsibility for the contents of the magazine they distribute merely says that because business is big it should escape responsibility. Upon the same argument big railways, big steel, big coal, big everything, including big labor unions, could claim to be above the public law. Stripped to the bones, this argument contends that the bigger the business the less responsibility and that bigness and responsibility should be in inverse ratio. Which is an absurd argument!

D. Petitioner submits that respondent was wantonly negligent in distributing libelous matter and is liable to him in damages.

It needs only a quick review of a few facts to show The American News Co. was wantonly negligent.

Mr. Eichorn testified that the LIFE account was taken on by defendant because the reputation of Time, Inc., was the highest; that it was absolutely reliable. (R. p. 195)

Yet it should be recalled here that LIFE in its inception in 1935 was a new venture in journalism without any reputation itself and especially vulnerable to mistakes and libel because it dealt so largely in display, captions and headlines which are not conditionally privileged and its journalistic method of re-writing and mixing comment with news is especially conducive to chronic error and libel.

The American News Co. stated that it relied upon the reputation of Time, Inc., when it took on the LIFE account. But it should be recalled that prior to the Hartmann case there had been libel actions against Time, Inc. for Time & Life articles as for example, *Cannon* v. *Time, Inc.*, 39 Fed. Sup. 660 (1939). This suit was based on an article in LIFE of the issue of May 16, 1938. Mr. King, of The American News Co. admitted that many suits might have been filed so far as he knew, but The American News Co. had done nothing to protect itself nor had it quit distributing the Time & Life magazines. (R. p. 182)

Another indication that Time, Inc. was not wholly reliable is the fact that it was "taken in" by "Under Cover" written by Arthur Derounian, alias John Roy Carlson, alias Pagnanelli, alias Decker, alias Paige, alias Eiler, etc., etc. There have been not less than three successful libel suits against the author and publishers of "Under Cover" (*Robnett* v. *Dutton & Co., et al.*, U. S. D. C. for the N. D. of Illi-

nois, 1946; *Chapman* v. *Dutton & Co.*, in Massachusetts; *Stokes* v. *Derounian* alias John Roy Carlson, et al., U. S. D. C. Utah, 1946. (John T. Flynn, "The Smear Terror" published in 1947 at 15 E. 40th Street, New York City.)

In the Chicago case, Judge Barnes was moved to say:

> "This book charges the plaintiff (Robnett) was disloyal, anti-semitic and a nazi agent. During the entire course of the trial I never heard any evidence to sustain any of these charges.
>
> "I think this book was written by a wholly irresponsible person who would write anything for a dollar. I think this book was published by a publisher who would do anything for a dollar. I don't believe any investigation of this author was made by the publishers to the extent they say there was because they cared for the dollar more than they did for the almighty truth.
>
> "I wouldn't believe this author if he was under oath and I think he and the publisher are as guilty as any one who was ever found guilty in this court before. . . ." (Quoted in Chicago Tribune, September 26, 1946.)

Yet the E. P. Dutton and Co. was supposedly a "reputable" publisher. The lack of care with which it printed "Under Cover" and the fact that LIFE magazine reviewed the book and then proceeded to link petitioner with the characters there, *something the author himself had not done,* raises a very serious question concerning the responsibility and good reputation of Time, Inc.

The callous indifference and want of care taken by respondent raised a presumption of conscious indifference to consequences and constituted wanton and gross negligence within the meaning of *Yoshizawa* v. *Hewitt,* 52 F. 2d 411, 79 A. L. R. 317; *Rushlow* v. *The Plattsburgh Republican Pub. Co., Inc.,* 262 App. Div. 931, 28 N. Y. S. 2d 867.

Because of the tremendous harm which respondent was equipped to do to petitioner by the distribution of nearly two million copies of defamatory material, respondent was under a duty to use caution and care commensurate with its potentialities for harm, *i. e.*, extraordinary care. Instead of such care, respondent brazenly testified that it used no care whatever to prevent distribution of the undeleted copies of LIFE magazine, even after the editors had found defamatory material, and that it owed no duty to petitioner because it was inexpedient for it to examine the contents of magazines distributed by it.

Because of its vast potentialities for harm, radio defamation is now libel, not slander, *Hartmann* v. *Winchell*, 296 N. Y. 296.

The difference in size and potentialities between the defendant here and the local news-peddler in *Street* v. *Johnson* and the entire indifference and wantonness of The American News Co., makes it unable to escape liability to petitioner by assuming the cloak of Mr. Johnson.

The issues were presented to the trial court in objections to evidence and requested instructions to the jury. The court refused to give petitioner's instructions numbered 9, 10, 17 which constitutes reversible error.

III.

The admission in evidence of the "Dies Committee" report and reading its contents to the jury was highly prejudicial to petitioner and constituted reversible error.

This point deals with the report of the Committee Investigating Un-American Activities (then known as the Dies Committee). It is in evidence as Exhibit 57 (R. pp. 85-107) and was admitted over the objection of petitioner (R. p. 84).

An examination will show that it was issued a month *after* the publication of the first libel involved here. It will disclose too that it was based entirely upon hearsay; that not one witness was examined. Further, that it did not record as a primary source any transaction, event or occurrence, but is purely the result of an unscientific and unscholarly inspection of the files of an organization known as Peace Now. Further still, that it is replete with expressions of opinion, unsupported conclusions hastily reached, quotations out of context, and statements which even on their face appear to be but half-truths. All this without giving the organization an opportunity to be heard, although the testimony showed that several specific requests to be heard were addressed to the committee.

The case books have been searched in vain for the citation of any other case where the court admitted in evidence a Dies Committee report.

It is said above that the conclusions were hastily reached. This is putting it very mildly indeed. For, though the Committee took the bank accounts, records, correspondence and membership lists on February 7, 1944 (Exhibit 57, R. p. 86), it required but ten days to prepare and print a report, for it was submitted to the Committee of the Whole House on February 17, 1944.

The report was not admitted in evidence to show a prior contradictory statement of the witness, or a conflict in evidence, but was admitted generally. (R. p. 214) It was twice read to the jury, the second time during summation. The sole reason why counsel for respondent read it during summation was to bolster up his highly passionate and extraordinary inflammatory appeal to whatever conventional patriotism and standard current community prejudices might be counted upon to sway the jury. It was so used because it is replete with opinions and conclusions of the investigator that the organization's activities "tend toward the encouragement of treason" (page 9). Terms similar to this are bandied about throughout the report.

On page 3 (R. pp. 89-90) we find discussed "an alien . . . whose activities . . . are clearly seditious" . . . and surprise expressed "that a man should be so actively associated with a seditious movement without ever being apprehended. . . ." Toward the bottom of page 4 (R. p. 92), "at least one of whose officers has been guilty of sedition." At the top of page 5 (R. p. 92), "These limits are clearly transgressed by those who go beyond private conscientious objection and advocate treason . . . the mailing . . . was a seditious act deliberately designed to lead toward wholesale treason. . . ." (R. p. 92) Similar grave conclusions and strong phraseology appear seven times on that page. The reporter or investigator reaches the heights of absurdity in that sentence wherein he states, "The request . . . involved a plan for mass treason which was truly colossal in its inception." (R. p. 93)

More quotations of this nature would merely burden the court. Let it suffice to say that in the pages following the foregoing excerpts we encounter such heavily colored phrases and terms as these: "undermining the morale" and "sabotage" (see page 10).

Since the report is filled with opinions, conclusions, and impressions it was highly objectionable and its admission in evidence and use as aforesaid constitutes reversible error. *Carpenter* v. *N. Y. Evening Journal,* 96 App. Div. 376, 89 N. Y. S. 263; *Commonwealth* v. *Slaviski,* 245 Mass. 405, 140 N. E. 465; *Sturla* v. *Freccia,* L. R. 5 App. Cas. 623 (1880); *Throckmorton* v. *Evening Post Pub. Co.,* 27 App. Div. 125; 50 N. Y. Supp. 153; *Williams* v. *Hicks,* 159 Wis. 90, 105, 150 N. W. 183; and other authorities cited above. In the *Carpenter* case, also a libel action, at page 379, we find:

> "It is evident that the counsel who tried this case sought to secure results from the jury and, therefore, had little regard for rules of evidence and competency of proof, with the result that the case is filled with

numerous and glaring errors which necessitates a reversal of the judgment . . . the defendant called William Travers Jerome as a witness. He testified that he was the district attorney of New York County at the time of the Patrick trial; that . . . prior (thereto)* . . . he was an assistant . . . and did make an investigation into the charges made against the plaintiff . . . He further testified that (he told)* . . . Recorder Goff . . . that in his opinion 'the case had been fixed.' To all of this testimony the plaintiff made repeated objection, which was overruled, and to which he took an exception. . . . It needs no authority to support the conclusion that this evidence was essentially incompetent. It was mere hearsay and did not rise to the dignity of proof. For a much smaller infringement in a similar case this court reversed a judgment. (*Throckmorton* v. *Evening Post Pub. Co.*, 27 App. Div. 125.) It was also more vicious than hearsay testimony, for the reason that the witness was not only permitted to testify to the investigation he made and its results, but was also permitted to give his opinion respecting the merits of the case, and the opinion thus expressed adjudged the plaintiff guilty of a crime of which he was charged in the indictment, and at a single stroke the defendant established its defense of justification as there was left nothing for the jury to determine. In practical effect the witness was permitted not only to establish a justification, but to render the verdict in favor of the defendant, for when this testimony was received, if credited by the jury, and they had the right to credit it under the ruling of the court, there remained nothing for them to do save to register in

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* Please note that the words that appear in brackets here and later are inserted in place of statements amounting thereto, and are made for brevity's sake.

proper form the opinion and judgment which had been pronounced. The ruling is so plainly erroneous as not to require further discussion.

"The charge . . . was that the 'Expelled Juror is a Rogues' Gallery man' . . . proof in its support must have been as broad as the charge. . . . The court in submitting the case to the jury left it to them to say as a question of fact whether the statement was true or not. The submission in this aspect was unwarranted, as it was conceded . . . that plaintiff's picture did not adorn the rogues' gallery, nor was any record of him found therein . . . The court was bound to charge under the proof that the charge as made in the libel in this respect had not been justified by proof as broad as the charge, as this confessedly was the fact."

It would be gilding the lily to comment *in extenso* on the foregoing. Let it suffice to say that here the court below allowed respondent to introduce in evidence a report which is admittedly based on hearsay, without hearing a witness pro or con, and which is replete with the ill-considered opinions of the investigator of the "guilt" of the organization (of which plaintiff was Chairman) and its officers as well. Not only was the report admitted in evidence and read to the jury—but to make doubly sure that none of the opinions expressed therein would be forgotten during the course of a five-day trial, it was again read in the closing argument of counsel for respondent.

In the Throckmorton libel case cited in the opinion above (27 App. Div. 125), a letter was involved. At page 127, the court says:

"It was objectionable because it contained hearsay evidence; because it assumed to give the opinion of the writer concerning the plaintiff; because it purported to give copies of letters written by third parties. . . ."

And at page 128:

> "These opinions . . . were calculated to, and I have no doubt did, prejudice the jury. The minds of the jury would naturally be diverted from the real issue. . . ."

This in summary is the exact situation here. The report (Exhibit 57) contained hearsay evidence; it gave the oft-repeated opinion of its author; it contained excerpts of material written by third parties; it groundlessly stated that petitioner was guilty of treason and sedition, and of working and associating with persons similarly charged.

Wisconsin courts have reversed judgments where witnesses were permitted to testify as to their conclusions, opinions, and impressions. Thus, in reversing the court below in *Williams* v. *Hicks*, 159 Wis. 90, 105, 106, 150 N. W. 183, the court said:

> ". . . the court permitted . . . witnesses to testify as to their conclusions, opinions, and impressions. . . . The conduct of the trial in this respect does not meet with our approval. . . ."

Speaking of the wrong done to the defendant by the admission of such testimony, the court continued (page 108):

> "Quite likely he was prejudiced . . . (by)* placing before them the opinions and impressions of witnesses instead of facts. . . ."

Amidst all these wild charges and bald assertions, unfounded conclusions and opinions of the Dies report, there stands out this one significant elemental FACT: That the aims and methods of the Peace Now group and copies of all subsequent literature were regularly placed before the Department of State and Department of Justice (p. 4). (R. pp. 96, 97) This is confirmed by copies of the letters sent

to the departments named (Exhibits X, Y, FF, GG). Yet at no time did the Department of Justice reach any of the amazing conclusions from this material the investigator reached!

The report was not used to establish an issuable fact, namely, whether petitioner was an "Indicted Fascist", for this was not the fact. The subsequent LIFE article (Exhibit B) concedes that petitioner was not indicted.

Furthermore, it was not used to establish that the actionable and offensive publication, the LIFE article (Exhibit A1-A6), was fair comment on a report of a Congressional Committee, for such was not the case. It could not be so for the LIFE article was published one month *before* the date of the Dies Committee Report (Exhibit 57) and the latter was not then in existence AND NOT EVEN IN PREPARATION. Hence its use as fair comment could not be maintained by respondent.

There was no purpose for which the court could properly admit the report of the Dies Committee. The libel in question was not based upon the publication of that report and the pleadings do not set up such fact in justification or as being fair comment. It was, as already noted, not used to show contradictory statements by any witness. It is not the entry of a public nature made by one in discharge of his duty to keep records, books, or registers. It does not concern an issuable fact. Failing to meet this latter test, which is of almost universal application, it was highly prejudicial to the plaintiff and calls for a reversal of the judgment. *Gaines* v. *Relf*, 12 Howard 472; *Commonwealth* v. *Slaviski*, 245 Mass. 405, 140 N. E. 465; *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623; *Richardson on Evidence*, 6th Ed. (1944) page 546; *Wigmore, Evidence*, Vol. 5, 3rd Ed. (1940) Sec. 1661; *Gilmore* v. *U. S.*, C. C. A. 5th Cir., 93 F. (2d) 774, 775; *Nunnally* v. *Press Pub. Co.*, 110 App. Div. (N. Y.) 10, 12, 96 N. Y. Supp. 1942.

In the Gaines case, at page 569, the court held that:

"... before it can be received as an official register, it must be shown by the party offering it, to be one which the law required to be kept for the public benefit." (p. 570): "Such writings are admissible in evidence on account of their public nature. . . . They are entitled to this extraordinary degree of confidence, partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses. . . ."

And in the case of *Commonwealth* v. *Slaviski,* the court said, at page 415:

"One of the acknowledged exceptions to the face-to-face rule is that public records are competent evidence when . . . of probative value respecting an issuable fact. That is an ancient principle of the common law . . ." (p. 417): "The principle . . . is that a record of a primary fact made by a public officer in the performance of official duty is or may be made by legislation competent *prima facie* evidence as to the existence of that fact, but that records of investigations and inquiries conducted either voluntarily or pursuant to requirement by law, by public officers concerning causes and effects involving the existence of judgment and discretion, expressions of opinion and making conclusions are not admissible in evidence as public records. This principle may be universally applicable and there may be exceptions, but it appears to be available in general as a practical working rule."

Please note that "records of investigations and inquiries conducted either voluntarily or pursuant to requirement by law . . . involving . . . expressions of opinion, and making conclusions are not admissible in evidence as public records." The court declares that "this principle may be universally applicable" and we have but to look at the following for substantiation of this controlling principle and valid reasons therefor.

The Lords, on the appeal in the case of *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623, rejected the report of a commission appointed to investigate. The facts narrated therein and the opinions expressed are as follows:

Page 629:

"My Lords, the question on this appeal is one as to the reception of evidence. The document in question, a report of certain persons called the Giunta di Marina, at Genoa, is sought to be put in evidence for the purpose of proving that a person . . . and the succession to whose daughter . . . is now in question was a native of Quarto near Genoa, and at the time that report was made, aged about forty-five years. The document has been tendered for that purpose and for that purpose only."

Page 632:

". . . .I am of opinion that it is necessary . . . that it should at least appear to have been founded upon statements made by members of Mangini's family or by Mangini himself.

"My Lords, several classes of cases in which evidence, not depending upon the oath of persons who have knowledge, is received in matters of pedigree, by the law of this country . . . they both involve this, as a necessary element, that the subject-matter of the declaration in the one case, and of the entry in the

other, must have been within the direct personal knowledge of the person making the declaration, or making the entry. That can have no application here."

Page 633:

"Then, my Lords . . . cases (of)* the findings of competent public officers, courts, or persons having legal jurisdiction to inquire, under public authority, into matters within that jurisdiction . . . I do not . . . (find)* that (they)* have any bearing at all on this matter. Its members were not in the nature of a Court . . . whose duty it was . . . to proceed upon just proof . . . and to have taken such proof, and only such proof, as the law of the country required. . . ."

By Lord Hatherly, at page 638:

" . . . if you accepted the argument on behalf of the Appellants, you would at once have a floodgate opened to a large mass of documents, which are not always remarkable for the ascertainment of truth—public commissions, and so on, without the least narrative of how these reports were arrived at. . . .

". . . But unfortunately the habits of mankind are not such, at present, as to lead one to desire any extension of the privilege of having evidence given and taken as part of the *res gestae* of that which is sought to be proved, when you do not find any of the ordinary safe-guards of evidence, namely the examination of witnesses in person."

How appropriate to the essential facts in this case is the foregoing decision! It is exactly as though Lord Hatherly were critically reviewing and rejecting the courtroom use of the product of the procedures of former Congressman Martin Dies and not that of the Giunta at Genoa. Here, as there, none of the minimum safeguards were taken.

NOT ONE WITNESS WAS EXAMINED—and the report makes no pretense to the contrary. Its admission in evidence constitutes reversible error.

The editors of LIFE seem recently to have done an about face on the validity of the Dies report. LIFE said recently:

> "And, as other names have popped up in the hearings, the public has swung wildly between the fear that Communist undercover activity is a 'clear and present danger' and the hesitant, nagging suspicion that our methods of Congressional investigation are not always in accord with the Bill of Rights. With the latter feeling LIFE (Jan. 12) has already dealt in an editorial called 'Is there a Witch Hunt?' We argued then, as we are prepared to argue now, that the House Committee on Un-American Activities has not always carried its mandate with elementary fairness. Its procedures, however, have improved somewhat in recent weeks" (LIFE, Sept. 6, 1948, p. 24).

In its January 12th issue, after discussing the committee LIFE remarked:

> "Having said that, we must add that the committee's method in its last hearings did little to remove the odor that headline-hunting Martin Dies gave when he ran it. Chairman Thomas has not repeated all Dies' blunders, but he has made new ones. . . . As things stand, the committee is as much on trial in the courts, as the writers." (Hollywood writers alleged to be communists.) (LIFE Magazine issue of Jan. 12, 1948, p. 26.)

Yet below it was contended (and accepted by the Court) that the Dies report on Peace Now is a valid document though no one from the organization was allowed to ap-

pear even after written request for the privilege was made by the petitioner, Hartmann. The odor of the headline hunting Martin Dies should certainly not be permitted to penetrate judicial proceedings.

IV.

Newspaper accounts and magazine articles, complaints in other libel actions against other publishers, and other material were admitted in evidence over objection. Their admission highly prejudiced petitioner and constitutes reversible error.

In a disputed case the admission of improper evidence may turn the scale. *Sheifel* v. *State*, 180 Wis. 186; 192 N. W. 386. It need not be developed at length, for it is clear from what has been argued earlier in this brief, that the issues were confused.

Respondent marked for identification and put in evidence over objection Exhibits numbered 1 through 145, most of them consisting of newspaper and magazine articles concerning petitioner; some of them being complaints in libel actions against other publications. Petitioner objected to them and the fact that only some are specifically referred to here shall not be considered as a waiver of such objections to the unanalyzed remainder. Limitations of space and time being what they are, this brief cannot deal with all of these numerous wrongly introduced and improperly admitted exhibits.

Defendant's Exhibit 54, (R. p. 309) NEWSWEEK, of February 7, 1944, consists purely of hearsay and was highly objectionable. The truth of the report, mentioned therein, that the Jap radio made reference to Peace Now, was never independently established nor was there any attempt made to connect petitioner with the Jap radio. In a widespread smear campaign to show that another smear was made is

allowed in evidence to establish the truth of a previous smear! Besides, what possible proof is it of the truth of the admittedly-false charge that petitioner was an *Indicted Fascist* that some radio broadcast, supposedly emanating from Japan, made mention of an organization called Peace Now? To ask the question is to make answer thereto, *it is no proof*. Yet the article was admitted in evidence and read to the jury.

Is there, by the admission of this clipping in evidence, any substantiation whatsoever of the revolting charge made by LIFE (Exhibit A-5) that petitioner compared favorably with that notorious anti-Semitic, rabble-rousing Nazi sympathizer, Joe McWilliams, indicted with 29 others, and so reported by LIFE and SO DIRECTLY COMPARED WITH PETITIONER? This far-fetched, uncertain, unreliable, and improper report is nonetheless accepted to establish the correctness of this defamatory comparison and its fairness.

Then there is Exhibit 85 (R. p. 311) concerning John Collett and a fine imposed for voyeurism. Because Collett was arrested as a peeping-Tom, that seriously establishes that petitioner was an indicted fascist, etc., etc. How utterly childish and ridiculous? Yet that is the sole purpose for which it was ostensibly admitted—to establish truth of the disputed (or contested) charge.

Another such exhibit was No. 130 (R. p. 329) concerned one John Dutko, who was convicted ONE MONTH AFTER THE PUBLICATION INVOLVED HERE of leaving a C. P. S. Camp. Dutko, a pacificist, entered a civilian public service camp. He left because he was not given "work of national importance" in accordance with the language of the act of Congress establishing such camps for conscientious objectors subject to the draft. The court admitted such record in evidence and allowed respondent to comment thereon although it did not affect the issue

since HE WAS NEVER AN OFFICER OF THE ORGANIZATION, did not originate or plan any of its activities, and was not an INDICTED FASCIST. Yet its acceptance was justified by the Court on the ground that AT ONE TIME DUTKO WAS CONSIDERED FAVORABLY BY THEM. Of such feeble stuff was the defense made up.

Exhibits 72 through 77, 79, 80, 84, and 86 consist of petitioner's complaints in libel actions against other publishers. They were admitted by the court, read and commented upon by the defense. This was allowed despite the clear ruling in *Smith* v. *Sun Printing & Pub. Ass'n*, 55 Fed. Rep. 240, 245, where the court held:

> "That other newspapers, which published similar libels, had been prosecuted by the plaintiff for their acts, was a matter with which neither court nor jury had any concern."

Exhibits 56, 58 through 61, 63 through 71 are clippings from other magazines and newspapers, and are all dated *after* the date of publication of the libel here involved. This applies to Exhibit 54, Newsweek, just discussed, as well. Under the straighforward doctrine laid down above, these items were wholly incompetent, irrelevant, and immaterial, and of absolutely no concern to the court and jury. As the Court of Appeals stated in *Palmer* v. *Matthews*, 162 N. Y. 100, 102, 56 N. E. 501:

> "It is now too well settled to be questioned that the fact that others have published the same libel which was unknown to the defendant when the publication complained of was made, or that suits have been commenced against others for the publication of such libel, is inadmissible. The defendants in this case were liable, and that some one else was also liable was immaterial."

Another Exhibit, No. 144 (R. pp. 349-367), a speech of the late President Roosevelt, was admitted in evidence over the objection of petitioner. Of what earthly relevance it had to the real issues in this case is impossible to understand. It dealt with the progress of the last war then in its active stage. It had no bearing on any of the definite issues involved in this case—and was therefore of no concern to the court and jury. But it was nonetheless admitted.

Why? To further bolster up the crude appeals to passion and prejudice which underlined each and every move of the defense. It was introduced for the purpose of reviving powerful war-time emotions by deviously arousing either the natural patriotism or political partisanship of the jury and thus destroying any possibility of an impartial verdict at their hands. It was calculated to and did help make impossible a fair and just verdict. It was designed to and did make it falsely appear that in weighing the evidence, the jury was under some obligation to decide between the well-known views and public standing of the late President (whose name was thus subtly exploited by being cast in the role of a co-defendant) and the less familiar views and private standing of the petitioner. It had nothing to do with the substance or merits of the charge published by the magazine LIFE and distributed far and wide by respondent, that petitioner was an "Indicted Fascist" and compared favorably with a notorious, indicted Nazi sympathizer. It had nothing to do with the fact that petitioner was falsely coupled with thirty persons who had actually been indicted. It had nothing to do with the fact that the editor of LIFE admitted that petitioner had not been indicted but that he had otherwise been fairly portrayed—which additional and separate libel had been distributed by respondent and was the subject matter of a separate count in the complaint.

The speech of Pres. Roosevelt was not admissible for any purpose. Sec. 327.02 of the Wis. Statutes applies to

statutes and not executive pronouncements and Sec. 327.18 applies to the evidentiary value of public documents but does not provide that every document is admissible merely because it appears in a public record.

The trial court properly refused admission of one speech by Pres. Roosevelt (R. p. 133) and then improperly allowed Ex. 144 to be admitted. Admission of Ex. 144 was grave error as has already been pointed out. It was not admissible as respondent contends (R. p. 208) to impeach Hartmann because only a stupid person would construe his statement that the war was already won in December, 1943, to mean hostilities had actually ceased. (The pacifists' evaluation of the situation in 1943-1944 may not be wrong when the entire history of World War II is finally written. Piecemeal evidence supporting their position already exists.) It has never yet been evidence of treason in the United States of America to urge a course contrary to the administration!! So to argue is a totalitarian philosophy in itself which the defendant claims to hate.

The next reason advanced for admission of Ex. 144 was said by Mr. Orr to be:

> "Second: The memory of all of us is too frail on these matters; and here is a statement which shows the environment in which the Peace Now Movement was operating in September of 1943" (R. p. 208).

Yet in its brief below, respondent argues that admission of Ex. 144 was not prejudicial error "because it dealt with matters which were common knowledge to the jury."

Petitioner is forced to conclude from the insulting and contradictory arguments advanced by the respondent that the REAL purpose of Ex. 144 was to prejudice the jury by aligning Roosevelt and the administration on the side

of the defense. Such unfair tactics must be stopped short by this appellate court for the benefit of all future litigants, as well as petitioner here.

But neither this nor any of the other "proof" is the proof required by law to establish the charge made and distributed. It is not proof as broad as the charge. *Carpenter* v. *N. Y. Evening Journal*, 96 App. Div. 376, 89 N. Y. Supp. 263. Nor does it meet the test of *Hallam* v. *Post Pub. Co.* (1893), 55 Fed. 456, aff'd 8 C. C. A. 201. At page 462, we find that:

> "The American rule, according to the weight of authority is substantially the same (as the English). In *Smith* v. *Tribune Co.*, 4 Biss. 477, the rule is stated to be that a public journal has no right to make specific charges against a public man unless they are actually true . . . Judge Drummond said that if the rule were otherwise every public man would be at the mercy of every journalist, and they could launch charges against him with impunity."

However, it fitted well with the plan and design of respondent to obtain results, viz., a verdict for respondent at no matter what the cost to the rules of evidence, fair play, or common decency. To that end this process of admitting the inadmissible played its part. This is the perverted material out of which totalitarian justice, of whatever hue, is made. The end justifies the means—that is the basic credo of all totalitarians no matter where found. But this is the negation of our system of government, of jurisprudence—of our most rudimentary concepts of justice. Hence it is crystal clear that this judgment and decision cannot stand.

This crucial thought must be considered by the Court and its full implications for the future behavior of litigants and the business and profession of journalism weighed. Should this Court, by refusing to review, put its stamp

of approval on the particular practices indulged in here, then it is in effect proclaiming that all that a confessed libeler need do to escape liability is to get other publications or vendors to reprint or re-circulate the libel either as "news" or otherwise, or by way of subsidy. And, by so creating a false impression of apparent universal condemnation of his victim, the libeler goes scot free and unpunished. Or, alternately, should the libeler conspire and engage with others in a wholesale smear campaign, to the extent that such smear campaign is successful in warping the minds of the newspaper and periodical reading public, and newspapermen, dealers and distributors, to such extent is the libeler exonerated and freed from responsibility.

Surely if great principles grounded in social policy, the protection of public morality, and the very foundations of logic have any application in American law they deserve to be made operative in the situation before the Court.

V.

The verdict of the jury is against the weight of the evidence and cannot stand and the judgment must be reversed or a new trial granted.

So much of the evidence has been reviewed already in this brief that only a few of the most important aspects of it will be summarized now. The law is undisputed that a general verdict of the jury for the defendant must be sustained by competent evidence and unless all of the issues raised by the defense are sustained by competent evidence a general verdict cannot stand, or stated in another way, if a general verdict is against the evidence in so much as a single respect, the judgment must be reversed. *Moak* v. *Bourne*, 13 Wis. 515. Fitting the rule to the case herein: if any of the issues raised by respondent, The American News Co. fails, then the verdict and judgment cannot stand.

Respondent contended that it was entitled to all of the defenses of both editor and independent distributor. It alleged that the LIFE articles were true and therefore justified. It was, however, unable to prove that Prof. Hartmann was either indicted or a fascist. The jury therefore could not have found for respondent on the issue of truth.

Respondent alleged further that comments made by it were based on true facts and that it had not exceeded fair criticism. As we have said, respondent abandoned any proof of truth that the petitioner was indicted or a fascist and, under the law, there is therefore no privilege to criticize or comment on untrue facts. Furthermore, captions are not in any event privileged, nor are comments which hold another up to contempt, ridicule and hatred privileged. Lastly, respondent forfeited any defense of privilege by its evidence that it was an independent wholesale distributor of magazines without knowledge of or interest in the reporting, writing and editing of LIFE. The jury could not have found both that respondent knew and *didn't know*. This absurdity in itself renders the verdict worthless and requires that it be set aside as well as the judgment on it.

Respondent admitting by its lack of evidence that it distributed defamatory material had the audacity to allege that, in any event, it was a distributor without connections with Time, Inc., and had no duty in any event to prevent distribution of the undeleted copies of LIFE dated January 17, 1944. Respondent distributed everything delivered to it during the week January 10 through January 14th, 1944. Petitioner's Exhibit BB (R. pp. 286-7) shows that most of the "indicted" copies went into newsstand distribution. A mere telephone relationship with Time, Inc., could have halted distribution of LIFE until the run of the "indicted" copies could be caught up with. This lack of care in itself vitiates a general verdict of the jury for re-

spondent. Also, although 3 weeks lapsed between the Jan. 17th issue and the Feb. 7th issue of LIFE during which Prof. Hartmann had made a written demand for retraction, respondent here claimed to have remained in complete ignorance of the whole thing. Such refusal to take care and wilfully to remain ignorant is not only negligence, but gross negligence, and the jury could not possibly have found for respondent on the evidence.

Since the verdict here is contrary to the evidence on more than one of the issues raised by the defense, the judgment must be reversed under the *Moak* case and others. In the *Moak* case, the action was one to recover possession of personal property under a chattel mortgage. The mortgage had included a yoke of oxen but it appeared without dispute at the trial that the yoke replevied did not belong to the mortgagor. The general verdict made no distinction and delivered all to the mortgagee. Because the verdict was a general one and against the evidence in at least one respect, the judgment had to be reversed.

Similarly where an action was upon a large number of town orders and a general verdict for recovery on all of them was rendered and it appeared without dispute that 3 of the orders should not have been included, a new trial was granted. *Dever* v. *The Town of Anson,* 43 Wis. 60.

Although it is the function of the jury to weigh the evidence, it is the duty of the court to set aside a verdict which is against the evidence, or against the weight of the evidence. *Pleasants* v. *Fant,* 89 U. S. 116, 22 Wall. 116, 22 L. Ed. 780. *The Connemera,* 25 S. Court 754, 108 U. S. 352, 27 L. Ed. 751; *Kelly* v. *Jackson,* ex dem. Morris, 31 U. S. 622, 6 Pet. 622, 8 L. Ed. 523; *Adams* v. *U. S.,* 116 F. 2d 199, *Jolitz* v. *Fintch,* 229 Wis. 256, 282 N. W. 87; *Dow* v. *Wells,* 11 F. 132 (where fact one of the parties was connected with a revolutionary war veteran swayed the jury). If the evidence offered by the party for whom a verdict is ren-

dered, conceding it the greatest probative force to which it is fairly entitled under the laws of evidence, is insufficient to support or to justify the verdict, it is the duty of the court to set aside such verdict and grant a new trial. *So. P.* v. *Hamilton,* (Nev.) 54 F. 468, 4 CCA 441, *Burke* v. *Wood,* 162 F. 533 (Ala.).

VI.

The verdict of the jury is the result of passion and prejudice and cannot stand. The judgment must be reversed or a new trial granted.

A party to an action tried before a jury is entitled to a verdict arrived at by careful and deliberate consideration, *Birchard* v. *Booth,* 4 Wis. 67; *Prahl* v. *Hogenson,* 185 Wis. 37, 200 N. W. 600, and a verdict will be set aside when evidence calculated to exercise a decided influence upon the minds of the jury has been improperly admitted. *Moore* v. *Langdon,* 2 Mackey 127, 13 D. C. 127.

Pondering over the paucity of The American News Co.'s competent evidence, the question comes to mind: How could the jury return a general verdict for respondent? The answer is that the jury was swayed by passion and prejudice, by vengeance and hate!

That the jury was so swayed is easily deduced from examining the atmosphere in which the case was tried. The flag waving was in the best style of political campaigning. Roosevelt was made as much a party to the action as though he had been interpleaded and loyalty to the Roosevelt administration (right or wrong) was made a test of treason. Shades of Dewey and Norman Thomas who openly campaigned in 1944 against Roosevelt policies, the Socialists then opposing unconditional surrender over radio and in the press!!!

Even the court, instructing the jury that petitioner was a public figure (R. p. 223), refused to further instruct the jury as requested (No. 7, R. p. 235) that petitioner was entitled under the constitution to exercise his freedom of speech in war time as well as peace times and that the exercise of such a right was neither treasonable nor subversive. (*U. S.* v. *Hartzel*, 322 U. S. 680, 88 L. Ed. 1534, 64 S. Ct. 1233.) The court further refused to define "treason" (R. p. 235) or "subversive" (R. pp. 235-6), leaving the jury to conclude that to be anti-Roosevelt was treasonous.

The court also without counter precautionary charges, instructed the jury that the LIFE articles were published at a time when "this nation of ours was engaged in the mighty effort of a global war and good citizens everywhere were extending their best efforts to try to bring victory to the arms of our nation. Our sons by the millions were fighting on the far-flung battle fronts of the world," etc., thus implying that it was *bad* citizenship to oppose Roosevelt's policy of unconditional surrender. Petitioner submits that the verdict of posterity will class him a good citizen for opposing the barbaric unconditional surrender policy in 1943 and that the verdict of his contemporaries would have been the same if reason had governed the jury instead of passion and prejudice.

The introduction of the Dies Report was a signal maneuver by the defense to impassion the jury. This report, in no way material, was hearsy, unfair, slanted, false and laden with emotional terms. It was nothing less than a dastardly attempt to smear Prof. Hartmann and the Peace Now Movement. This characterization of the report is made because of the misuse of quotations, material, and terms such as "sedition," "treason," "treason to the administration" and "wholesale treason."

Such a juvenile misuse of words would be laughable if the report had been put out by anybody less than a Congressional committee. The committee apparently forgot

the U. S. Const. III, 3 and failed to consult the decisions of *Cramer* v. *U. S.*, 325 U. S. 1, 65 S. Ct. 918, 89 L. Ed. 1441 and *Hartzel* v. *U. S.*, 322 U. S. 680, 88 L. Ed. 1534, 64 S. Ct. 1233.

The President's speech of Sept. 17, 1943, (Ex. 144) was introduced for the like purpose of prejudicing the jury. Roosevelt could not deliver an unemotional speech and this was no exception. Instead of calmly taking the American people into his confidence and explaining to them that a thrust through Europe, the so-called "second front," was primarily a Russian plan, which Churchill (as we know now) had opposed and that "unconditional surrender" meant the annihilation of Germany and the strengthening of Russian influence (as Hartmann pointed out) and letting them understand what was actually going on, appealed to hate and vengeance to "win the war" for "freedom and justice and security at home and abroad." This highly emotional appeal was put before the jury here who were to "deliberate" and render a fair and rational verdict.

It would have been humanly impossible for an average jury to overcome its passions and prejudices and render a verdict by careful and deliberate consideration in such an atmosphere.

VII.

The interests of justice demand that the judgment be reversed or a new trial granted.

The Court has the right to grant a new trial in the interests of justice and this right should be fairly and courageously exercised where the verdict of the jury is manifestly wrong, and, since the verdict herein clearly cannot stand, the petitioner submits that this is a case where the interests of justice demand that the judgment be set aside or that a new trial be granted because of the errors mentioned herein.

Conclusion

The skeletal facts in petitioner's case have been covered in this brief. So the petitioner now at the conclusion of his argument, because his case was not properly decided and because of its great importance in the field of civil liberties, earnestly appeals to this High Court to review the decision and judgment of the Circuit Court of Appeals which erred in refusing him a reversal of the judgment, or a new trial.

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March , 1949.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 683

GEORGE W. HARTMANN,

Petitioner,

against

THE AMERICAN NEWS COMPANY, a Delaware Corporation,

Respondent.

PETITIONER'S REPLY BRIEF

ALFRED A. ALBERT,
Attorney for Petitioner.

ANNA MAE DAVIS,
SIGMUND GOLDSTEIN,
of Counsel.

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Supreme Court of the United States

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Petitioner,

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The American News Company, a Delaware Corporation,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

Statement on the Facts

Respondent states, (brief, p. 4) that petitioner was out of step with his Government during the active phase of the war, the inference being that this permitted opponents to smear petitioner as they pleased. Undoubtedly too, this regularized the use against him of any material regardless of "whether it was" "true or not" as the respondent's brief puts it (p. 13).

Also, that the slug "U. S. Indicts Fascists (continued)" was a common printer's device (p. 5) and this was conceded by petitioner's counsel. No such concession appears in the record. It shows that counsel stated that it was "common practice" "to break a story on two pages". Petitioner's counsel was interrupted while trying to call the Court's attention to the fact that it may be "general

practice" to run a story on two or more pages and to connect them "but" (R. 123). There being but one connected story, that relating to Fascist Indictments and Peace Now (R. 245), the headline "U. S. Indicts Fascists (continued)" immediately above petitioner's hairline indicated precisely that: that petitioner was an indicted fascist.

It is completely at variance with the facts for respondent to state that the questions presented to this Court, by the petition herein, were not urged upon the Courts below. The contrary is the case. Examination of the briefs below will establish this beyond peradventure of doubt. For such purpose, and because of the seriousness of the issue, sufficient copies thereof are being submitted simultaneously herewith.

Argument

Petitioner will attempt to reply to respondent's points, in the order in which they appear in the brief but will omit reply to inconsequential arguments and will avoid re-arguing matters in the brief submitted in support of the petition. Respondent has, in several places, in addition to the one already noted, inadequately or mistakenly interpreted the record, petitioner's brief and the decisions cited. And, has raised a new issue, although no cross-appeal was taken.

POINT I

Reply to Point I. The published charge is libelous per se.

At the very outset, it should be noted, that respondent made no attempt to answer petitioner's argument as to the applicability of the doctrine of *Peck* v. *Tribune* to the facts in the instant case. Finding itself unable to challenge petitioner's arguments and the sound reasoning of this august tribunal in that case and its direct bearing on the issues

involved here, it is urged that petitioner's petition and brief are presenting matters to this Court for the first time. There is absolutely no basis for such statement—and the briefs below are the best proof.

Respondent further contends that no proper objection was made to the instructions given or to the refusal to charge as requested and cites *Palmer* v. *Hoffman* and *Thiede* v. *Utah* (brief, p. 6). In the first case at page 119 and in the second at page 522 we find discussed the doctrine that exceptions must be sufficiently specific to call the court's attention to the precise matters complained of. This was raised before the trial court in the instant case on the motion for judgment notwithstanding the verdict. And the Court fully approved of the conduct of petitioner's counsel. The record, page 375 shows the following:

> "Mr. Orr: "Refused instruction. There is no error there. Counsel made blanket exception, and you can't make a blanket exception. She did not except separately as to each refused instruction.
>
> The Court: I think perhaps she did, it is my recollection.
>
> Mr. Orr: I know she didn't because—excuse me for contradicting—it is in writing. I have a copy of it in my office. She said, 'We except for failure to give instructions 1, 2, 4, 5 and 9.' That is not a specific exception.
>
> The Court: I would hold that would be sufficient. Go ahead" (R., p. 375).

This set the law of the case, for no appeal was taken. Moreover, who should know better than the Court of first instance whether the objections taken were specific enough to draw his attention to the precise points so that he may then and there consider them? Having answered affirmatively, on a matter designed to aid him, that answer is determinative of the issue.

In the same point we find the assertion that headlines must be *interpreted* in the light of the remainder of the article unless the headlines themselves identify the plaintiff. And again cases are cited, which do not support this contention.

In the *Woods* case, cited at page 7, the Court said:

> "• • • we find the respondent to be the object of an unfounded accusation by his wife. He is not charged with the commission of any offense or the doing of any act" (by the newspaper).

Now, it is abundantly clear that this is not the situation here. At bar we have a case where the headlines DO CHARGE AN INDICTMENT FOR A CRIME, a completely and wholly unwarranted accusation made by the respondent's alter ego, and distributed far, wide and handsome by the respondent who has come into Court, taking the position of an editor, namely, that the charge is true—but not one word of proof supports the charge.

In the other case cited, *Schoenfeld* v. *Journal Co.*, the Court pointed out that no one was named in the headlines, NO ONE WAS PICTURED, and the article was otherwise privileged. And this significant holding appears in that case at page 137.

> "There is authority to support, or tending to support the contention of the plaintiff that headlines may be libelous and the whole libel may be included in the headlines preceding an otherwise privileged article • • • (citing cases); but the headlines here complained of were not libelous. The plaintiff would have been on a different footing if the headlines had been otherwise and the plaintiff would be the clearly ascertained or ascertainable person of whom such headline was written and published."

Here, the headline charges petitioner with having been indicted and the headline appears directly over his picture. Hence every test made in the *Schoenfeld* case is met in full.

Next we come to the matter of negligence raised by respondent's brief at page 9, and evidence of custom. None of the cases are in point. The *Sprecher* case is one involving a Master and Servant.

The *Stasek* case concerned itself with interpreting a statute regulating the sale of poisonous drugs. The *Reiher* case turned on whether a *cuspidor* is customarily placed behind a newel post! The *Eich* case dealt with a situation where logging operators were plaintiff and defendant and because of peculiar traffic conditions on mountain roads had agreed with other logging operators that unloaded trucks were to give full right of way to loaded trucks.

None of these cases is authority for the proposition that by private agreement the rights of the public become obsolete and yield to the custom among the observants thereof. If that proposition were valid, then the giant monopolies would have a perfect defense to every anti-trust action; cartels would be perfectly legal, etc., etc.

It should be noted that the *Eich* case concerned itself with the parties to that understanding—not a stranger.

POINT II

Answering the argument on the rulings on the admission of evidence.

It seems to be respondent's argument that it is not enough to make several objections to a line of proof. Indeed, no! The objectant must continue to pop up and down like a jack-in-the-box until he makes himself obnox-

ious AND SO ANTAGONIZES THE COURT AND JURY. This same argument was made in the Circuit Court and while it was not covered in the opinion below, it should be noted that Judge Major definitely and decisively rejected this stating what has just been written.

The "proof" in this case followed a pattern—so many newspapers and periodicals published the same or similar libels. So many of these publications were sued. It seems to be abundantly clear that when several objections were taken and the Court fully apprised as to petitioner's (plaintiff's) position on this line of proof, that is all that was required. If the law is that proof of similar libels by other publications is not the concern of the Court and the Jury, then after calling this to the Court's attention by repeated objections taken and noted, and the Court's acknowledgment thereof, it is no longer necessary to pop up and down like a cork at sea. The various positions of Counsel are illustrated by what took place at the time of offering the Dies Report in evidence.

This appears in respondent's brief at pages 10 and 11. But what transpired is not set out in full. The record shows the following:

> Mr. Orr: I will offer Exhibit 57 in evidence.
>
> Mr. Goldstein: I object to it as incompetent, irrelevant and immaterial. It is subsequent to the publishing of the libels involved here.
>
> Mr. Orr: It is relevant on many counts, your Honor.
>
> The Court: Well, I was going to say, it may or may not be relevant, I think I will overrule the objection, without prejudice to your renewing it again at the end of the trial, if you think it has not been connected up in any way.
>
> Mr. Orr: Your Honor; may I state that it is already connected up?
>
> The Court: Well, I don't know.

Mr. Orr: This man has testified that he was made ill by this article.

We want to show the many documents that could have made him ill.

He testified that he lost his job by reason of the Life article. We want to show the many documents which would have accounted for that.

They were all prior to the illness, and the loss of the position.

The Court: What is the date of it?

Mr. Orr: The date is February 17th, 1944.

The Court: The present ruling is: It may be received over the objection (R. p. 84).

The respondent argues that petitioner should have again moved at the end of the trial with regard to the Dies Report. If petitioner had done so, then the illegal "evidence", which consisted of unfounded accusations of high crimes, would have had its effect upon the jury and the paper itself removed as evidence. Then respondent would have argued THAT NO HARM HAD BEEN DONE BECAUSE IT HAD BEEN EXPUNGED AS EVIDENCE. It seems to be quite plain that respondent knows that the "evidence" was highly objectionable and seeks to escape responsibility for its introduction by placing the burden now on petitioner to have moved to expunge it. ONCE THAT DOCUMENT WAS READ TO THE JURY A FAIR TRIAL WAS IMPOSSIBLE.

That the conviction for voyeurism of Collet and for leaving a CPS Camp by Dutko had no bearing on the issue in the case at bar of being an "indicted fascist" is considered in the main brief and will not be repeated here.

So too with regard to the speech of the late president, F. D. Roosevelt, except that it is necessary to call this Court's attention to its decision in *Palmer* v. *Hoffman*, 318 U. S. 109, 114. Respondent argues that the speech

was properly admitted in evidence. It is violative of the hearsay rule as announced by this High Court and it was pointed out that

> "Such a major change which opens wide the door to avoidance of cross-examination and should not be left to implication."

POINT III

Answering same point in respondent's brief.

In the *Sturm* case (brief, p. 13), preceding that part of the opinion which we find on that page, the Court noted several times that there were no requests for instructions. No exceptions were taken to the trial court's charge. As already noted in this reply brief, page 3, THAT IS NOT THE SITUATION AT BAR. The reverse is the fact. Here was done all that needs be done AND THE TRIAL COURT SO HELD.

In the *Edwards* case, next cited by respondent, the same situation prevailed, no requests were involved and no exceptions. And in the *United States* v. *Harrell* case, which respondent would have this Court believe is in point, a rule IN CONDEMNATION CASES was involved. The Court holding is the applicable rule in such cases is the procedure of the ARKANSAS COURTS IN CONDEMNATION PROCEEDINGS.

POINT IV

Respondent's attitude is that the end justifies the means.

This is amply demonstrated by the reckless abandon of respondent's argument found at the top of page 13. It argues, the speech of the late president was admissible to show the environment in which these pacifists

operated (and incidentally to make it appear that the late president was somehow a party to the action, as a defendant). And for this purpose *"it was immaterial whether the statements in the speech were true or not"*.

Other than to say that this is the cornerstone of totalitarian justice, no comment will be made for this bespeaks the entire motivation of the respondent as well as TIME, INC. in whose shoes it stepped in the defense in this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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ANNA MAE DAVIS,
SIGMUND GOLDSTEIN,
of Counsel.

May 10, 1949.

FILE COPY

Supreme Court of the United States

OCTOBER TERM 1948

No. 683

GEORGE W. HARTMANN,

Petitioner,

—against—

THE AMERICAN NEWS COMPANY, a Delaware corporation,

Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 2, 1949.

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OCTOBER TERM 1948

GEORGE W. HARTMANN,
Petitioner,

—against—

THE AMERICAN NEWS COMPANY, a Delaware corporation,
Respondent.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit (R. 448-57*) with respect to which certiorari is sought is reported at 171 F. (2d) 581. On January 4, 1949, the Court of Appeals denied a petition for rehearing (R. 458).

Statement

The decision which petitioner seeks to review affirmed a judgment of the District Court entered upon a jury verdict returned for respondent.

The controversy is the outgrowth of an article published by Time Inc. in its magazine Life dated January 17, 1944.

*All references are to pages of the Record.

The article in question (Ex. A, R. 245-55) described various groups of persons who were resisting the war effort, including a group known as "Peace Now" of which petitioner was the chairman. After the appearance of the article petitioner wrote a letter of protest to Time Inc., which letter was published in part in the February 7, 1944 issue of Life together with an editorial comment thereon (Ex. B, R. 256-7). It is petitioner's contention that he was libeled by both articles.

Time Inc. is not a party to the lawsuit. Respondent is The American News Company, a corporation engaged in the business of distributing periodicals for various publishers. Its arrangement with Time Inc. was that it would purchase copies of Life, distribute them to newsdealers, and resell to Time Inc. any copies of Life which were not successfully disposed of (R. 194).

Petitioner is a highly educated middle-aged professor of educational psychology at Teachers College, Columbia University. He has had wide experience in public speaking. He was Socialist candidate for Congress in 1934 in Pennsylvania, Socialist candidate for judge of the Supreme Court of the Commonwealth in 1935 in Pennsylvania, Socialist candidate for the office of Lieutenant Governor in 1938 in New York, and Socialist candidate for Mayor in 1941 in New York City (R. 67).

On July 9, 1943, petitioner and various associates formed the Peace Now movement. The activities of Peace Now consisted of publicizing its opposition to the war effort and to the national administration (R. 43-4 and see Ex. 20, R. 302). Many of the statements issued by the Peace Now movement were inflammatory in nature and were calculated to impede the war effort (e. g. Ex. 5, R.

291, Ex. 11, R. 292; Ex. 13, R. 298; Ex. 16, R. 300). Such objections precipitated criticisms of Peace Now by various newspapers and magazines, other than Time Inc., both prior and subsequent to the Life articles of which complaint is made (e. g. Ex. 28, R. 304).

In the statement of facts appearing in petitioner's brief on pages 29-30 all of his troubles are attributed to the publication of the Life article. Yet:

(a) In almost identical language describing his troubles, petitioner, during a suit against the Philadelphia Inquirer over the publication of another article, attributed his troubles to an article which appeared in the Philadelphia Inquirer (R. 142).

(b) In a suit against the Boston Herald, petitioner, in almost identical language, described his troubles and attributed them to an article which appeared in the Boston Herald (R. 142-143). The article published in the Boston Herald had been published on January 30, 1944, thirteen days subsequent to the Life article; but at the Boston trial petitioner testified that prior to the publication of the Boston Herald article, to wit, January 30, 1944, his relations with his students and the faculty had been "cordial and pleasant" (R. 143), and that the Boston Herald article had been the primary cause of his troubles (R. 144).

(c) Subsequent to the Wisconsin trial petitioner, when testifying in a suit brought by him against the New York Daily Mirror, in almost identical language described his troubles and attributed them to an article which appeared in that newspaper in New York.

Examples of the literature published or circulated by personnel of Peace Now as proved at the trial, are set forth in the amended answer of respondent (R. 14-18).

The Life article was a truthful report of his activities and free from any misrepresentation. Petitioner was obviously out of step with his Government and its Allies in a time of national crisis. His activities were of such a character that a truthful report of them would naturally cause most people to shun the petitioner. In the words of Dean Russell of Teachers College, Columbia University, who testified for respondent, petitioner's activities were such that he "cooked his own goose" (R. 146).

Life magazine is a news picture magazine. It was engaged in the business of reporting matters of public interest (R. 177). No one connected with Time Inc., so far as its publisher knew, was acquainted with petitioner (R. 177). Its purpose in writing the article was "the journalistic purpose of reporting events as we see them" (R. 177). The magazine was not engaged in any campaign of vilification of persons who objected to the war policies of the United States Government (R. 177). Life magazine considered that the Peace Now movement sought to create popular distrust of the war leaders and national policy of the United States and its Allies (R. 177). It considered that articles published by the Peace Now movement were dangerous and subversive (R. 174-5). "At a time when the country was straining every effort to win the war these widely publicized attempts to arouse the people in favor of an immediate peace were certainly destructive of the war effort" (R. 175).

In December 1943 three newsworthy events occurred with respect to persons or groups of persons who were opposed to the war effort. Life magazine reported upon

the incarceration of persons who had sought to arouse insubordination in the Army and Navy, upon the indictment of certain Fascists, and upon the activities of Peace Now in a single article as it considered the three news stories to constitute related events (R. 181). Its article in so far as it related to Peace Now was a description of the Peace Now movement. As appears from an inspection of the article (R. 245) emphasis was placed on describing the movement, and Hartmann is mentioned only incidentally as chairman of the movement together with other people who were active in Peace Now. The slug "U. S. Indicts Fascists (continued)" was used as a common printers' device for the sole purpose of associating related events (R. 181). The use of such a printers' device is a common practice, as conceded by petitioner's counsel (R. 123), and is almost a matter of common knowledge, as stated by the Trial Court (R. 123).

The basic question now before this Court is whether petitioner presents any sound reason for a further review of the case. Petitioner has not suggested any such reason. His argument is an attempt to obtain a review by this Court of questions which were presented neither to the District Court nor to the Court of Appeals. The petition does not raise any question of public or general interest.

QUESTION PRESENTED

Did the Wisconsin District Court, as affirmed by the Court of Appeals, follow the law of Wisconsin in its conduct of the trial?

SUMMARY OF ARGUMENT

1. The District Court correctly submitted to the jury the question of whether the article sued upon could be construed to be libelous and the question of respondent's freedom from negligence.

2. The District Court did not err in the admission of evidence.

3. The question of the sufficiency of the evidence was not presented to the District Court or to the Court of Appeals and is not before this Court.

ARGUMENT

Point I.

THE QUESTION OF WHETHER OR NOT PETITIONER HAD BEEN LIBELED WAS PROPERLY SUBMITTED TO THE JURY.

No proper objection sufficient to raise this point on appeal in the Court of Appeals or this Court was made at the trial. The point is founded upon purported errors in instruction given to the jury ("contested issues" 3-6, 9-10, petitioner's brief pp. 19-20) and in instructions which were refused ("contested issues" 2, 4, 6, 8-10, 21-3, petitioner's brief pp. 19-21). Yet no proper objection was made either to the instructions given (*Palmer* v. *Hoffman,* 318 U. S. 109) or with regard to refusal to charge instructions requested (*Thiede* v. *Utah,* 159 U. S. 510). See Federal Rule of Civil Procedure 51.

It is the law of Wisconsin that where an allegedly libelous article is subject to both a libelous and a non-libelous meaning it is for the jury to say which meaning would have been ascribed to it by the ordinary reader. The court merely passes upon the capability of the language to convey the libelous meaning. The jury determines whether or not such meaning would be conveyed to the ordinary reader. If there is "substantial doubt" as to the meaning which an ordinary reader would accord the article, then it is a jury question. See *Judevine* v. *Benzies-Montanye Fuel and Whole-Sale Co.*, 222 Wis. 512, 517, 269 N. W. 295; *Leuch* v. *Berger*, 161 Wis. 564, 570, 155 N. W. 148; *Hoan* v. *Journal Co.*, 238 Wis. 311, 329, 298 N. W. 228; *Arnold* v. *Ingram*, 151 Wis. 438, 456, 138 N. W. 111; *Woods* v. *Sentinel-News Co.*, 216 Wis. 627, 629, 258 N. W. 166. In *York* v. *Cole*, 190 Wis. 179, 181, 208 N. W. 944, 945, the court said that if the article is unambiguous, the question of libel is for the court, but if there is a "reasonable possibility" of a libelous meaning, a jury question is presented.

Moreover, it is well settled in Wisconsin that in determining whether or not a particular article is libelous the headlines must be interpreted in the light of the body of the article read as a whole, unless the headlines in and of themselves identify the plaintiff. In *Schoenfeld* v. *Journal Co.*, 204 Wis. 132, 137, 235 N. W. 442, the headline was "Warrant for Pastor in Fur Thefts." The jury found, and the court sustained the finding, that such article was not libelous. In *Woods* v. *Sentinel-News Co.*, 216 Wis. 627, 258 N. W. 166, the same rule was applied where the headline read "Cops Free 'Robber' But Hold His Wife!"

In submitting this case to the jury the Trial Court expressly told the jury what petitioner contended the

article meant (R. 220), and then left it to the jury "to say what a person of average intelligence and comprehension would have understood by reading said articles" (R. 220).

Petitioner also argues that the question of respondent's alleged negligence should not have been submitted to the jury (Br. pp. 54-56). The contrary rule is settled. *Street* v. *Johnson,* 80 Wis. 455, 50 N. W. 395.*

There was no proof of malice in this case. It is undisputed that neither respondent nor any of its employees knew petitioner at the time of the publications complained of (R. 194). They were merely an impersonal conduit between publisher and reader, as free from intent of injuring petitioner as the engineer on the train that hauled the magazines from Chicago.

Petitioner's argument that custom of an industry does not relieve respondent from liability ignores the Court's instruction on the subject. The Court told the jury (R. 223):

> "In determining whether a reasonable man in the position of the defendant would have attempted to procure such knowledge prior to distribution of the magazines, you are instructed that you may consider, as an element, the care exercised by other persons who are engaged in the same business as the defendant. If the distribution of these magazines by the defendant was made in the usual and cus-

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*The *Street* case is in accord with modern authority in that it discharges a periodical distributor from liability if he distributed the periodicals without knowledge of their contents and if he was not negligent in his failure to have such knowledge. See *Bowerman* v. *Detroit Free Press,* 278 Mich. 443, 283 N. W. 642; *Albi* v. *Street & Smith Publications,* 140 F. 2d 310 (CCA 9).

tomary way established by the industry, you may consider that fact in determining whether ordinary care was exercised by the defendant."

It is the law of Wisconsin that where a question of negligence is involved, evidence of custom is admissible. *Sprecher* v. *Roberts,* 212 Wis. 69, 74, 248 N. W. 795: *Stasek* v. *Banner Coffee Co.,* 164 Wis. 538, 540, 159 N. W. 945; *Reiner* v. *Mandernack,* 234 Wis. 568, 571, 573, 291 N. W. 758; *Eich* v. *Brennan,* 223 Wis. 174, 176, 270 N. W. 47.

Point II.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN RULING ON THE ADMISSION OF EVIDENCE.

Petitioner complains (Br. pp. 74-6) of the admission of Exhibits 54, 72 through 77, 79, 80, 84, 85 and 86, and also of the admission of Exhibits 56, 58 through 61 and 63 through 71. We will not argue the admissibility of those exhibits for the reason that none of them were objected to. As proof of the fact that they were not objected to, we here supply the Record pages omitted in petitioner's brief:

As to Exhibit 54—see Record 138;
As to Exhibit 72—see Record 130;
As to Exhibit 73—see Record 131, 146 and 147;
As to Exhibit 74—see Record 124, 146 and 147;
As to Exhibit 75—see Record 127;
As to Exhibit 76—see Record 128;
As to Exhibit 77—see Record 131, 146 and 147;
As to Exhibit 79—see Record 146;
As to Exhibit 80—see Record 147;
As to Exhibit 84—see Record 146 and 147;

As to Exhibit 85—see Record 68;
As to Exhibit 86—see Record 147;
As to Exhibits 56, 64, 67 and 70—see Record 147;
As to Exhibits 58, 59, 60, 61, 65, 66, 68 and 69—see Record 209;
As to Exhibit 63—see Record 143.

The unreliability of petitioner's brief is illustrated by his complaint in "contested issue" number 19 over the admission of Exhibit 78 and in "contested issue" number 20 over the admission of Exhibit 71. Exhibit 78 was never offered in evidence, and petitioner's objection to Exhibit 71 was sustained and it was not received in evidence.

The Dies report (Ex. 57, R. 84-102) was correctly received in evidence. Respondent sought to show, as bearing on the question of whether or not petitioner's illness and discharge were caused by the publications in Life magazine, that numerous other articles concerning petitioner and his activities have been published, including the Dies report. Petitioner testified that his illness and his discharge from Columbia University occurred in May, 1944 (R. 64). He also testified that his illness and his discharge from Columbia University were caused by the publication in Life magazine. The force of the Dies report as tending to explain petitioner's illness and discharge—especially when it is remembered that it was published by a Congressional committee—is fully set forth in petitioner's own brief (p. 65).

It was pointed out to the Trial Court, when the exhibit was admitted in evidence, that it was admissible because of such illness and such loss of job (R. 84).

However, the complete answer to this section of the brief lies in the Court's ruling when the exhibit was admitted (R. 84). The Court said

> "Well, I was going to say it may or may not be relevant. I think I will overrule the objection, without prejudice to your renewing it again at the end of the trial if you think it has not been connected up in any way."

In this state of the record, and in view of the importance which petitioner now seeks to attach to the admission of the exhibit, it was petitioner's duty to renew his objection at the end of the trial. He did not do so. Nor did he move to have the jury instructed to disregard the exhibit. Nor did he ask to have the exhibit restricted to a special use or to have the jury instructed that the exhibit should be considered for only a special purpose. Nevertheless, the Court in instructing the jury only mentioned the Dies Committee report in connection with the subject of damages (R. 225).

The law is clear that where testimony is admitted subject to objection, or admitted on the promise that it will be later connected up, it is necessary that the objection be renewed or there is a waiver of the objection.

Petitioner complains of the admission in evidence of Collett's conviction for voyeurism and of Dutko's conviction for absenting himself illegally from a Civilian Public Service Camp. The Trial Court's ruling was patently correct. On cross-examination, petitioner had testified that to his knowledge the organizers of the Peace Now Movement were "loyal American citizens, patriotic, respectable, law abiding" (R. 67). He also testified that the temporary committee included John Collett as field secretary, that Collett had assisted in the formation of the Peace Now Movement (R. 68), and that Dutko was sent $100 to further the Peace Now aims in Chicago (R. 79). In that situation,

the fact that Collett and Dutko were not respectable and law-abiding was obviously admissible for purposes of impeachment and hence was relevant.

In fact, the court did not need to (as it did) restrict the evidence to impeachment purposes, since the character of the Peace Now Movement and the persons comprising it was in issue, and consequently respondent was entitled to demonstrate the type of person connected with the movement.

Petitioner's long diatribe relative to the admission of President Roosevelt's report to Congress (Ex. 144, R. 208) is quickly answered. Petitioner testified (R. 203) that the war had already been won in July of 1943. The President's report to Congress was delivered on September 17, 1943 and disclosed the state of the war at that time. It was a summation of the military situation facing the country by the Commander in Chief of the armed forces and showed that the country faced a grave peril. The speech was the President's report to Congress, as indicated on the face of the exhibit, and the exhibit itself was certified to be a copy of a portion of the Congressional Record of the 78th Congress (R. 349). As appears from the certificate, the speech was contained in a book printed by authority of the United States of America and hence was admissible under section 327.02 of the Wisconsin Statutes. The speech was the report of a public officer and hence was admissible under section 327.18 of the Wisconsin Statutes. It was of such wide notoriety that it could have been judicially noticed. Law of Evidence in Civil Cases by Burr W. Jones, 4th edition, 1938, Volume I, section 122, page 209.

One of the purposes for which it was introduced was to show the environment in which Peace Now operated (R.

208). For that purpose it was immaterial whether the statements made in the speech were true or not. The *fact* that the speech had been delivered was an independently relevant fact, since it supported respondent's claim that the Peace Now Movement was dangerous and subversive to a united effort to gain a worthwhile peace.

Point III.

THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE IS NOT BEFORE THIS COURT.

After verdict, petitioner moved for a judgment notwithstanding the verdict or in the alternative for a new trial (R. 369). At no time did petitioner move for a directed verdict or request the court to refuse to submit any of the defenses asserted by the respondent.

It is not clear whether petitioner is now assigning the Trial Court's refusal to grant a new trial as error, or whether he is simply asking this Court to weigh the evidence. It is clear however, that this Court has neither the power nor the duty to retry this lawsuit. Petitioner is in much the same position as the appellant in *Sturm* v. *Chicago N. W. Railway Co.*, 157 F. 2d 407 (CCA 8), where the Court said:

> "It is obvious that this appeal presents no question which is reviewable by this court. No ruling of the trial court is challenged. The question of the sufficiency of the evidence to support the verdict is not subject to review, since that question was not presented to the trial court by a motion for a directed verdict or any other equivalent action. * * * This court is without power to retry this case. It cannot

> concern itself with the credibility of witnesses or the weight of evidence."

The necessity that any motion testing the sufficiency of the evidence be preceded by a motion for a directed verdict is unquestionable. It is required by Rule 50(b) of the Federal Rules of Civil Procedure and the courts have repeatedly declared that such a motion is a prerequisite. In *Edwards* v. *Craig,* 138 F. 2d 608 (CCA 7), the Court said:

> "Since the defendant-appellant made no motion for a directed verdict, the insufficiency of the evidence cannot be raised here."

It is contemplated that these rules will be adhered to. In *United States* v. *Harrell,* 133 F. 2d 504, 506 (CCA 8) the Court declared:

> "If the requirement that the Rules of Civil Procedure shall govern appeals from judgments in condemnation cases is to be given effect, questions for review by federal appellate courts must be preserved in the manner prescribed by those rules. The required procedure for testing on appeal the sufficiency of the evidence is by motion for a directed verdict at the close of all the evidence. Rule 50, Rules of Civil Procedure. It has been held in a case tried under the Conformity Act, 28 U. S. C. A. § 724, that Rule 50 'does not do away with but emphasizes the necessity of a motion for a directed verdict to raise [on appeal] the legal question whether the evidence is sufficient.' "

A party should not be permitted to gamble on the outcome of a jury verdict, and if it goes against him, then to contend that there is no evidence to support such a verdict.

On motions after verdict the trial judge, a judge of considerable trial experience, made the following statement:

> "I thought the jury was an intelligent jury. I didn't know any of them. I was called in to try the case, to sit for Judge Stone, but as I watched them for over a week—not over a week, but nearly a week, they seemed to me to be good, average, intelligent and honest jurors.
>
> "Now, this is a case where I think the plaintiff had a fair trial. The jury decided contrary to the plaintiff's contentions. The fact that the plaintiff did not win, of course, naturally, they feel quite badly about that, I assume, but I don't think that means that there was any passion or prejudice shown on the part of the jury, and I do not think that the verdict is inconsistent with substantial justice."

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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May 2, 1949.